Supreme Court, U.S.
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No. 10- 101065 FEB 24 2011

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Supreme Court of the United States

O.K. INDUSTRIES, INC., O.K. FOODS, INC., O.K. FARMS, INC., AND O.K. BROILER FARMS LIMITED PARTNERSHIP,
Petitioners,

v.

CHARLES BEEN, DON FROST, ROBERT FIELDS, EUGENE JOHNSON, AND EUGENE BLACKWELL, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this damage action under the Packers and Stockyards Act ("PSA"), a judgment of $14,551,935 was entered in favor of a class of contract poultry growers (the Respondents here) and against a poultry processor (Petitioners here) whose chicks they raised to market-ready birds. Respondents claimed that they sold their services under a condition of monopsony, and that Petitioners' control over the number of birds they were given and the prices they were paid so reduced total market supply that consumer prices were raised. Throughout the relevant period, Petitioners held only a 2% share of the market for chicken sold in the United States, but over that period their production of chicken increased by 65%, total output of chicken in the United States increased by nearly one-third, and the prices consumers paid for chicken fell in both nominal and real terms.

1. Whether a live poultry dealer controlling 2% of domestic supply, sold by competitive bid, can be proved to have injured output-market competition with a truncated competitive effects analysis of its vertical arrangements, simply because it holds a lawful monopsony where it purchases inputs?

2. Whether the PSA's prohibition of any "unfair practice" by "live poultry dealers with respect to live poultry" permits a judgment against a "live poultry dealer" for restricting output when the dealer distributed every chick that it hatched for ultimate production to the market?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

O.K. Industries, Inc., O.K. Foods, Inc., O.K. Farms, Inc., and O.K. Broiler Farms Limited Partnership were the appellants below and are the petitioners in this Court. O.K. Industries, Inc. is a privately held corporation and is the parent corporation of O.K. Foods, Inc. and O.K. Farms, Inc. Petitioners O.K. Foods, Inc. and O.K. Farms, Inc. are wholly-owned subsidiaries of petitioner O.K. Industries, Inc. Petitioner O.K. Broiler Farms Limited Partnership is a privately held Arkansas limited partnership. No publicly held company owns 10% or more of the stock of O.K. Industries, Inc., O.K. Foods, Inc., or O.K. Farms, Inc., and no publicly held company owns 10% or more of the units of petitioner O.K. Broiler Farms Limited Partnership.

Charles Been, Don Frost, Robert Fields, Eugene Johnson, and Eugene Blackwell, individually and on behalf of others similarly situated, are individuals and were the appellees below. They are the respondents in this Court.

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IN THE

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O.K. INDUSTRIES, INC., O.K. FOODS, INC., O.K. FARMS, INC., AND O.K. BROILER FARMS LIMITED PARTNERSHIP,

Petitioners,

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CHARLES BEEN, DON FROST, ROBERT FIELDS, EUGENE JOHNSON, AND EUGENE BLACKWELL, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

O.K. Industries, Inc., O.K. Foods, Inc., O.K. Farms, Inc., and O.K. Broiler Farms Limited Partnership (collectively "O.K.") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 2010 WL 3995981 (10th Cir. Oct. 13, 2010) ("*Been II*") and reproduced in the Appendix ("App.") at 1a.

The November 26, 2010 order of the Court of Appeals denying O.K.'s petition for rehearing and rehearing *en banc* is unreported and is reproduced at App. 100a. A prior opinion of the Court of Appeals in this matter is reported at 495 F.3d 1217 (10th Cir. 2007) ("*Been I*") and is reproduced at App. 34a. The decision of the United States District Court for the Eastern District of Oklahoma denying O.K.'s motion for judgment as a matter of law is unreported and is reproduced at App. 80a. The decision of the United States District Court for the Eastern District of Oklahoma denying O.K.'s motion for new trial is reported at 2008 WL 2704470 (E.D. Okla. July 3, 2008), and is reproduced at App. 86a. The decision of the United States District Court for the Eastern District of Oklahoma denying O.K.'s motion for summary judgment is not reported and is reproduced at App. 91a.

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 2010. App 1a. Petitioner timely filed a petition for rehearing or rehearing en banc, which the Court of Appeals denied on November 26, 2010. App. 100a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title I, Section 2(a) of the Packers and Stockyards Act, 7 U.S.C. § 182, reads in pertinent part:

> When used in this chapter—
>
> * * * *
>
> (6) The term "poultry" means chickens, turkeys, ducks, geese, and other domestic fowl;
>
> * * * *

(8) The term "poultry grower" means any person engaged in the business of raising and caring for live poultry for slaughter by another, whether the poultry is owned by such person or another, but not an employee of the owner of such poultry;

(9) The term "poultry growing arrangement" means any growout contract, marketing agreement, or other arrangement under which a poultry grower raises and cares for live poultry for delivery, in accord with another's instructions, for slaughter;

(10) The term "live poultry dealer" means any person engaged in the business of obtaining live poultry by purchase or under a poultry growing arrangement for the purpose of either slaughtering it or selling it for slaughter by another, if poultry is obtained by such person in commerce, or if poultry obtained by such person is sold or shipped in commerce, or if poultry products from poultry obtained by such person are sold or shipped in commerce;

* * * *

Section 202 of the Packers and Stockyards Act, 7 U.S.C. § 192, provides in pertinent part:

> It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry to:

(a) engage in or use any unfair, unjustly discriminatory, or deceptive practice or device;

* * * *

INTRODUCTION

Petitioners ("O.K.") ask the Court to resolve conflicts among the circuits with respect to recurring questions of national importance in cases requiring proof of injury to competition. In *California Dental Association v. FTC*, 526 U.S. 756 (1999), this Court held that truncated competitive effects analysis to prove injury to competition under Section 1 of the Sherman Act, 15 U.S.C. § 1, is appropriate only when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets," noting the application of such analysis to horizontal agreements and combinations previously reviewed by this Court. *Id.* at 770.

While this case arises under Section 202(a) of the Packers & Stockyards Act ("PSA"), 7 U.S.C. § 192(a), rather than the Sherman Act, that principle is applicable. Section 202(a) of PSA, which prohibits certain "unfair practices" in the meat and poultry industries, has consistently been construed to require a showing that the challenged conduct injures competition. In this case, O.K. sells its chicken in a nationwide market by competitive bid, and has but a 2% share of that market. In addition, during the relevant period of this litigation, its total output of chicken has increased by 65%, while nationally, production increased by about a third. Notwithstanding O.K.'s minimal market share and expanding production, the Tenth Circuit held that Respondents

were entitled to rely on the truncated competitive effects analysis that this Court adopted in *Indiana Federation of Dentists v. FTC*, 476 U.S. 447 (1986), because their expert opined statistically that O.K.'s internal production decisions affected national and immediate resale prices.

O.K. is a vertically-integrated poultry company that owns hatcheries, feed mills, and processing plants. It contracts with independent farmers, "growers," to raise chicks to market-ready weight with chicks, feed, and medicine supplied without cost, in return for payment at the end of the grow out. O.K. determines the number of chicks to be distributed to each grower, and when each grower receives a new flock. While these decisions are internal to O.K., and thus represent unilateral conduct, they are permitted by the growing contracts that O.K. enters into with farmers, such as Respondents. Because growers do not compete with O.K., such contracts are, in antitrust parlance, vertical arrangements. Under the Sherman Act, the competitive effects of vertical arrangements are analyzed under the full Rule of Reason. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

In cases challenging vertical conduct, the circuit courts have consistently held that proof of injury to competition requires a threshold showing that the defendant wields power in the relevant output market. *See, e.g., PSKS, Inc. v. Leegin Creative Leather Prods.*, 615 F.3d 412, 419 n.5 (5th Cir 2010), *cert. denied,* 2011 WL 588420 (U.S., Feb. 22, 2011); *Digital Equip. Corp. v. Uniq Digital Techs., Inc.*, 73 F.3d 756, 761 (7th Cir. 1996); Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 17 (1984). Ordinary competition law principles deem a 2% share

insufficient to force buyers into uneconomic bargains. *See, e.g., Jefferson Parish Hosp. Dist. No.2 v. Hyde*, 466 U.S. 2, 26-27 (1984) (30% market share insufficient as a matter of law to raise an inference of market power in a vertical contract restricting anesthesiology services supplied at a hospital); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 217 (D.C. Cir. 1986) (Bork, J.) (5-6% market share insufficient as matter of law to support market power in a horizontal arrangement among a van line's independent carrying agents), *cert. denied*, 479 U.S. 1033 (1987). The rule of law adopted by the Tenth Circuit in this case cannot be squared with this approach.

The Tenth Circuit's decision conflicts with those of other circuits in two respects. First, the decision conflicts with the Seventh Circuit's decision in *Republic Tobacco Co. v. North Atlantic Trading Co.*, 381 F.3d 717 (7th Cir. 2004). The Seventh Circuit held that *Indiana Federation*'s truncated competitive effects analysis does not apply to vertical restraints, and would only apply where plaintiff proves: (i) the rough contours of a relevant market; and (ii) the defendant commanded "a substantial share of the market." *Id.* at 737. The Tenth Circuit jettisoned any reliance on output market share because O.K. is the only purchaser of poultry growing services in a small area of eastern Oklahoma, and therefore, in the court's view, a "monopsonist." Yet even accepting that characterization, it is well-understood by scholars by that alleged monopsonists, such as O.K., that sell their output in competitive markets cannot raise prices above the competitive level. IIB Philip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 575, at 402-03 (3d Ed. 2007). Thus, the Tenth Circuit's holding doubly conflicts with

Republic Tobacco: it permits alleged evidence of actual anticompetitive effects to prove injury to competition arising from a vertical restraint, and does so in a case where defendant's market share is very low. *Union Carbide Corp. v. Montell, N.V.*, 27 F. Supp. 2d 414, 418 (S.D.N.Y. 1998), reviewed the literature finding no instance where actual adverse effects existed in the absence of high market shares *and* conduct bordering on illegality.

Second, the Tenth Circuit's ruling directly conflicts with several decisions of the other circuits holding that a truncated competitive effects analysis must yield to a more searching market analysis when a defendant offers plausible competitive benefits for its challenged practice. *See, e.g.*, *Deutscher Tennis Bund GmBH v. ATP Tour, Inc.*, 610 F.3d 820 (3d Cir.), *cert. denied*, 131 S. Ct. 658 (2010). Here, the record evidence established without dispute that: (i) O.K.'s aggregate chicken production increased 65% over ten years while total market output rose by more than 30%; (ii) the number of farmers from whom O.K. purchased growing services increased; (iii) each grower's individual production increased; and (iv) prices paid to farmers for growing services rose faster than inflation while both real and nominal consumer prices for chicken declined. Yet the Tenth Circuit brushed aside these facts and held that truncated competitive effects analysis of competitive injury is appropriate even when there is ample evidence in the record of procompetitive benefits resulting from the challenged conduct. As explained below, that holding cannot be squared with those of several other circuits.

If permitted to stand, this conflict will not only apply different legal rules to identical conduct depending on the chosen venue, but also will create severe dislocations in all industries subject to the PSA. It is not uncommon for a poultry dealer, such as O.K. to be the only chicken processing company in a given area. James M. MacDonald, *The Economic Organization of U.S. Broiler Production,* at 13, Econ. Info. Bull. No. 38, Econ. Res. Serv. U.S. Dep't. of Agric. (June 2008) http://www.ers.usda.gov/Publications/EIB38/EIB38.pdf. (24% of growers report having only one purchaser in their area). It is relatively easy for growers to portray poultry dealers as monopsonists and, under the Tenth Circuit's rule, subject their internal production decisions to second-guessing by judges and juries. This Court has cautioned against competition law rules that threaten to turn courts into "central planners, identifying the proper price, quantity, and other terms of dealing." *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 408 (2004). The decision below, however, does just that. The Court should grant the petition for certiorari and resolve this conflict.

STATEMENT OF THE CASE

1. O.K. Has Substantially Increased Chicken Output to the Benefit of Consumers. O.K. is a vertically-integrated poultry company that owns breeding stock, hatcheries, feed mills, and processing plants along the Arkansas-Oklahoma border. It contracts with independent farmers, known as growers, to raise chicks to maturity under a poultry growing arrangement. These contracts require O.K. to supply chicks, feed, and medicine to growers at no cost, delivering these items directly to growers' farms. O.K. has contract growers in Arkansas whose

farms are located close to three competing processing plants, two owned by Tyson Foods in Waldron and Clarksville, and one by Wayne Farms in Danville, Arkansas. O.K.'s Arkansas growers can generally choose among two or more buyers for their services.

O.K.'s growers in Oklahoma, however, are too far from the nearest competing plant to contract with it, and therefore only one of O.K.'s competitors (Tyson) has even a handful of Oklahoma farmers, just inside the state line. For approximately 270 growing farms in Oklahoma, O.K. is the only purchaser for their services.

Respondents are growers for O.K. in Oklahoma. While labeling O.K. a "monopsony" purchaser of growing services in their region, Respondents have conceded that O.K. has done nothing "nefarious" to attain its "monopsony" with respect to Oklahoma farms. Despite its supposedly favored position in Oklahoma, O.K. offers the same growing contracts containing the same terms to growers in Oklahoma and in Arkansas. Respondents have never contended that O.K. provided more birds or higher payments to Arkansas growers.

A grower must build and equip at least two houses suitable for raising chickens, which, in 2001, just prior to suit, cost approximately $160,000 each. The magnitude of the investment that O.K. makes with a two-house farm is reciprocally considerable. A two-house flock of 48,000 chicks (valued at $0.15 per chick in the parties' contract), grown to 6.75 pounds each on average, and requiring 2.1 pounds of feed (at $0.09 per pound per the contract valuation) to produce a pound of final weight will, across 5.5 flocks per year, oblige O.K. to invest more than $370,000 each year to supply inputs to the two-house farm,

plus costs of transportation and medicines. O.K.'s contracts with growers are at-will arrangements, affording O.K. the legal ability to terminate a grower who wastes the assets the grower is given. Respondents conceded that O.K. has never terminated a grower. App. 85a.

Growing arrangements like O.K.'s, and the incentives for cost-effective practices that they give farmers, have proven to be highly efficient. Between 1997 and 2007, the relevant period in this litigation, output of chicken in the whole poultry industry increased by nearly one-third, from 37 billion pounds to 49 billion pounds. O.K.'s own production rose 65%, from 629 million pounds in 1997 to 1.04 billion pounds in 2007. O.K.'s share of the market for chicken sold in the United States jumped from 1.7% to 2.1%, averaging 2%.

As total output of chicken increased from 1997-2007, domestic consumer prices fell in both nominal and inflation-adjusted terms. Growers' expert conceded that domestic chicken prices have declined steadily since 1980 without sacrificing consistency or quality. A comparison between the revenues per pound that O.K. received, and the Wholesale Prices of Whole Chickens published by the Department of Agriculture show that O.K.'s prices lagged that index. At trial, O.K.'s evidence showed that it distributed every chick its hatcheries produced to growers to be raised by them for the consumer market. Respondents conceded that they had no evidence that O.K. had produced below the capacity of its hatcheries or the physical capacity of its owned resources. In addition, they did not dispute that O.K. purchases extra chicks from third parties, when available, to supplement supply from O.K.'s own

hatcheries. Sometimes no extra chicks are available; sometimes up to 200,000 a week can be trucked in from Georgia and South Carolina. Therefore, as was noted at trial, O.K.'s production of chicks is "variable" because the supply of chicks from its own facilities (hatch rate) and from third parties will vary.

O.K.'s principal product is breast meat, which it further processes by breading, cooking, and freezing it into sandwich filets, patties, and tenders for fast food chains, such as Burger King and Wendy's, and also for retailers, such as Wal-Mart.[1] Any breast meat produced in excess of the needs of these customers is sold on the spot market to purchasers who shop for the best prices.

O.K.'s business customers solicit bids from multiple chicken producers. Typically O.K. bids against three to five other companies to earn the right to be a supplier. O.K. is not the sole supplier to any of the companies that buy from it. Its contracts guarantee it no particular volume of sales. Its white meat contracts are fixed-price agreements that last a year.

2. The Proceedings Below. Two months after Russia placed an embargo on American poultry, Respondents brought this case against O.K. on behalf of themselves and a putative class of Oklahoma growers that contract with O.K. They claimed that two of O.K.'s practices restricted their individual production of chicken: the number of chicks distributed in each flock per square foot of housing ("density"); and the days a grower must wait before

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[1] Dark meat and wings are by-products of breast meat production, and are exported, via competitively-bid, fixed-price agreements running 30-45 days in length. Exporters to Russia have been the largest customers for leg quarters.

being restocked ("days out"). Growers claimed that such restrictions constituted "unfair practices" under Section 202(a) of the PSA. In addition, they claimed they lacked the same information about chickens that O.K. had, that their houses were too large for the number of birds they were given, and they were not paid enough for their labors, all of which had some unspecified impact on the total production they could achieve.

On January 28, 2005, the trial court granted summary judgment to O.K. on Respondents' PSA claim because none of the alleged "unfair practices" resulted in any harm to competition. Respondents appealed to the Tenth Circuit contending that Section 202(a) did not oblige them to prove injury to competition.

On July 31, 2007, the Tenth Circuit rejected that argument, holding that claimants under Section 202(a) of the PSA must show competitive harm to prove a violation. Nonetheless, it reversed the grant of summary judgment to O.K. because it concluded that Respondents had raised a triable issue on the question of harm to competition. Noting that O.K. might hold a "monopsony" in eastern Oklahoma, the court held that there was evidence that "when wholesale prices are weak, [O.K.] will delay sending chicks out to growers," a practice that, it concluded, may injure competition in the consumer market. *Been I*, 495 F.3d at 1233; App. 59-60a. The court held that "to demonstrate that a monopsonist has engaged in 'unfair practices' under § 202(a), a seller [Respondents] must show that the buyer's [O.K.'s] practices threaten to injure competition by arbitrarily decreasing prices paid to sellers *with the likely effect*

of increasing resale prices." Id. (emphasis added); App. 59a.

On remand, O.K. met Respondents' complaints about its "density" and "days out" practices, which most directly affected production. With respect to density, the evidence established that while densities had diminished over time, from 1.25 per foot in 1992 to 1.17 per foot in 2007, bird weights had risen substantially. Larger birds need more room, and are set less densely. Respondents are paid by the pound, and their expert conceded that their individual production measured in pounds was not reduced. In fact, his own calculations showed that individual growers supplied 32 pounds per square foot of housing in 1997, and between 36 and 38 pounds per foot in 2007. He conceded that O.K.'s density decisions had had no impact on the company's own aggregate production to the market, and further that he had no evidence that O.K. produced below its hatcheries' capacity or the capacity of its owned resources.

With respect to days out, O.K. attempts to replace flocks within 10-14 days, and on average replaces flocks about two days sooner than other poultry dealers. Time is needed for pathogens from the preceding flock to die before day-old chicks with no developed immune system can be set into that growing environment. The only years when the 10-14 day window was exceeded were 1997 and 2002-03. In 1997, O.K.'s new contract attracted so many additional growers that its hatcheries were unable to supply each with a full flock in 14 days, and farmers had to wait in line 18.97 days to be resupplied. Once new hatcheries came on line in 1998, O.K.'s annual production immediately jumped 20%. Then, in 2002

and 2003, Russia placed an embargo on American chicken, and days out rose to 17 days. Still, in both embargo years, 2002 and 2003, O.K. placed *even more* birds for its growers to raise. Growers, in turn, supplied O.K.'s plants with 147 million birds in both 2002 and 2003, more than the previous-record 143 million that had been delivered for processing in 2001.

At the close of the evidence, the trial court denied O.K.'s motion for judgment as a matter of law. *See* Fed. R. Civ. P. 50. The jury returned a verdict for Respondents and awarded $21,141,975.00 in damages, nearly $7 million more than Respondents' own expert calculated. The district court denied O.K.'s motion for judgment as a matter of law, App. 80a, and denied its motion for a new trial conditioned upon Respondents' acceptance of a remittur reducing damages to $14,511,935.00. App. 86a-90a. Respondents accepted the remittur.

On appeal, O.K. contended that the undisputed evidence precluded any finding of injury to competition. While noting that O.K. held only a 2% market share in the chicken output market, the Tenth Circuit held that testimony from Respondents' expert that O.K.'s practices "impacted immediate resale and national prices" was sufficient to sustain the judgment, 2010 WL 3995981 at *9; App. 20a, conceiving that *Indiana Federation* deems such evidence sufficient for every case brought under the antitrust laws. O.K. also contended on appeal that because it produced at the physical capacity of its owned resources, it could not have used an unfair practice "with respect to live poultry" as the PSA requires. Put another way, even if Respondents owned the hatcheries and could distribute output at

discretion, they themselves could not have grown any more chickens than they did with O.K. making the decision. The Tenth Circuit rejected that argument, holding that evidence of variable production alone was sufficient to sustain the judgment. App. 19-20a. A timely petition for rehearing or rehearing *en banc* was filed, which the Tenth Circuit denied on November 26, 2010. App. 100a.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THOSE OF OTHER CIRCUITS

The Court should grant the petition because the decision below conflicts directly with decisions of other circuits. *See* S. Ct. Rule 10(a). As explained below, the upshot of the Tenth Circuit's decision in this case is that the legality of ordinary, internal production decisions made by companies subject to the PSA will turn on where claims are brought and on the business judgments of juries, who will be allowed to second-guess those decisions as long as an expert can express an opinion stating that those decisions affected output prices. Under the Tenth Circuit's holding, this is so even though (1) the defendant lacks any substantial market share and (2) the undisputed market evidence reveals that total output has increased and consumer prices have fallen.[2]

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[2] Market power is the ability to raise prices profitably above the competitive level. *NCAA v. Board of Regents*, 468 U.S. 85, at 109 n. 38 (1984).

The conflict between the judgment below and the Seventh Circuit's holding in *Republic Tobacco, supra,* is clear. There, the court held that vertical distribution agreements were not subject to the truncated competitive effects analysis adopted by this Court in *Indiana Federation*. *Republic Tobacco*'s dicta opened the possibility that in a proper case, market power might be proved against a vertical restraint by "direct evidence of anticompetitive effects," but only if the defendant held a "substantial market share," 381 F.3d, at 737. Otherwise, *Republic Tobacco* said "As horizontal agreements are more suspect than vertical agreements, we must be cautious about importing relaxed standards of proof from horizontal agreement cases into vertical agreement cases. To do so might harm competition and frustrate the very goals that antitrust law rules try to achieve." The Eleventh Circuit, in reviewing a horizontal agreement, has referred to such proofs as constituting a "low threshold." *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1065 (11th Cir. 2005), *cert. denied*, 548 U.S. 919 (2006). Probably for these reasons *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1*, 309 F.3d 836, 840 (5th Cir. 2002), expressed doubt that *Indiana Federation*'s detrimental effects analysis may be employed in cases challenging vertical restraints. The conflict between the Seventh and Tenth Circuits on this point supports granting certiorari. *Braxton v. United States*, 500 U.S. 344, 347 (1991).

While *Republic Tobacco* arose under Section 1 of the Sherman Act, 15 U.S.C. § 1, and this case arises under the PSA, *Republic Tobacco*'s pertinence is not reduced. Both this Court and the circuit courts have consistently noted that Section 202(a) of the PSA, 7 U.S.C. § 192(a), has its lineage in antitrust law. In

Stafford v. Wallace, 258 U.S. 495 (1922), this Court recognized that the "chief evil" that Section 202 sought to address was "the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and *arbitrarily to increase the price to the consumer, who buys.*" *Id.* at 514-15 (emphasis added).

Given this statutory aim, Section 202 "incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation." *De Jong Packing Co. v. U.S. Dep't of Agric.*, 618 F.2d 1329 1335 n.7 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980); *see also Armour & Co. v. United States*, 402 F.2d 712, 722 (7th Cir. 1968) ("Congress gave the Secretary no mandate to ignore the general outline of long-time antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged."). Accordingly, every appellate court to consider the issue, including the Tenth Circuit in *Been I*, *supra*, has held that to prove a violation of PSA Section 202(a)'s "unfairness" proscription, plaintiffs must prove injury to competition,[3] incorporating antitrust principles.

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[3] *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 276-79 (6th Cir. 2010), *cert. denied*, 2011 WL 197656 (U.S. Jan. 24, 2011); *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (en banc); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir.), *cert. denied*, 546 U.S. 1034 (2005); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, 1998 WL 709324 at *4-5 (4th Cir. Oct. 5, 1998); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *Farrow v. U.S. Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985); *De Jong*, 618 F.2d at 1336-37; *Pac. Trading Co. v. Wilson & Co.*,

The unusual treatment the Tenth Circuit gave to a vertical restraint is starkly at odds with consensus thinking. In *Sylvania,* this Court expressly recognized that vertical arrangements have substantial potential for stimulating competition, 433 U.S. at 51, and therefore that any categorical proscription of vertical nonprice agreements was inappropriate. *Id.* at 47-59. Since that time, the Court has been "solicitous to assure that the market-freeing effect of *Sylvania* is not frustrated," *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988), and noted that doctrine in this area should be formulated to protect *Sylvania's* approach. *Id.*

As a result of this principle, circuit courts have consistently held that market power is an "indispensable ingredient" of claims challenging vertical arrangements, *see, e.g., Digital Equip. Co.*, 73 F.3d at 761, insisting that plaintiffs prove such power through market analysis before a court may intervene. *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 338 (2d Cir. 2008). A party has market power when, by restricting its own output, it can restrict market-wide output, and hence increase market-wide prices. IIA Philip Areeda & Donald Turner, *Antitrust Law* ¶ 501, at 322 (1st Ed. 1978). To do so, a party's output must loom so large that restriction of it cannot readily be addressed by increased production from rivals. *L.A.P.D., Inc. v. Gen. Elec. Corp.,* 132 F.3d 402, 405 (7th Cir. 1997) (Easterbrook, J.) Without market power to increase prices above competitive levels, and *sustain* them for an extended period, consumer welfare is not threatened. *Rebel Oil Co. v. Atl. Richfield Co.,*

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547 F.2d 367, 369-70 (7th Cir. 1976); *see also Armour & Co.*, 402 F.2d 712.

51 F.3d 1421, 1434 (9th Cir.), *cert. denied*, 516 U.S. 987 (1995). Selling by competitive bid, as O.K. does, negates "power over price," *Nat'l Reporting Co. v. Alderson Reporting Co.*, 763 F.2d 1020, 1024 (8th Cir. 1985) (Arnold, J.). Consequently, absent structural abnormalties, market power is inferred from a predominant share of the market. Yet in no case but this one has a defendant with a 2% share been found able to injure competition with internal protection decisions.

It is easy to understand why the other circuits are hesitant to find injury to competition proceeding from the unilateral production decisions of a party with a small market share. The purpose of antitrust law is to protect consumers. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription'") (quoting Robert Bork, *The Antitrust Paradox* 66 (1978)); *Sanderson v. Culligan Int'l Co.*, 415 F.3d 620, 623 (7th Cir. 2005) ("The antitrust laws protect consumers, not producers. They favor competition of all kinds, whether or not some other producers think the competition *'fair.'*"). The same is true of the PSA. As this Court has noted, the "chief evil" to which the PSA is directed is a monopoly that permits a party subject to the statute to raise prices to consumers. *See Stafford*, 258 U.S. 514-15. Thus, the same consumer orientation that underlies the Sherman Act permeates the PSA as well.

Respondents disputed neither that the relevant market for analyzing the competitive effects of O.K.'s practices was the market for chicken sold in the United States nor that O.K. had only a 2% share of that market. The other circuits, relying on this Court's holding in *Jefferson Parish*, 466 U.S. at 26-

27, have routinely held that market shares under 30% cannot support a finding of market power "as a matter of law." *See, e.g.*, *Brokerage Concepts v. U.S. Healthcare, Inc.*, 140 F.3d 494, 517 (3d Cir. 1998) (20-25% insufficient); *Retina Assocs., P.A. v. S. Baptist Hosp. of Fla., Inc.*, 105 F.3d 1376, 1384 (11th Cir. 1999) (15% share insufficient); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 667 (7th Cir. 1988) (surveying cases and finding no instance in which market power was found when a defendant had a share of less than 17-25%); *A.I. Root Co. v. Computer/Dynamics, Inc.* 806 F.2d 673, 675 (6th Cir. 1986) (2-4% share insufficient); *Dimmit Agri. Indus. v. CPC Int'l, Inc.* 679 F.2d 516, 530 (5th Cir. 1982) (21% share insufficient), *cert. denied*, 460 U.S. 1082 (1983). Indeed, as Judge Bork has noted, "so impotent to raise prices is a firm with a market share of 5 or 6% that any attempt by it to engage in a monopolistic restriction of output would be little short of suicidal." *Rothery*, 792 F.2d at 217. Because the Tenth Circuit's holding cannot be squared with circuit consensus, the Court should grant review and resolve the conflict.

The Tenth Circuit's invocation of *Indiana Federation* permitted a very deep anomaly to go unresolved: O.K., with a 2% market share, *out-produced* rivals in a *falling* market and was held to have injured the consumer. Such a proposition requires a detailed market analysis, not statistical inference. Instead of treating these facts as triggering a "more sedulous" analytical inquiry, *Cal. Dental Ass'n.*, 526 U.S. at 781, the Tenth Circuit treated the testimony of plaintiffs' expert about allegedly "actual detrimental effects" as raising a question for the jury to decide. *Been II*, 2010 WL 3995981 at *9 (testimony of plaintiffs' expert,

"notwithstanding O.K.'s own evidence of its purported lack of market power, was sufficient in our view both to create a genuine issue of material fact as to whether O.K.'s production practices over time [were] likely to increase consumer prices for [O.K.'s] products in comparison to what prices would have been but for the practice") (internal quotations omitted); App. 19a. That holding conflicts directly with the Third Circuit's conclusion in *Deutscher Tennis Bund* that "[t]he application of the quick look analysis is a question of law to be determined by the court, and therefore the concept of quick look *has no application to jury inquiry.*" 610 F.3d at 833 (emphasis added).

Finally, these conflicts cannot be dismissed as resulting from the application of a specialized regulatory statute to a specific industry designed to deter specific conduct. As this Court has noted in the Sherman Act context, competition policy is not like other forms of regulation. Excessive deterrence resulting from regulation in the food safety area, for example, may well be consistent with the aims of the statute in question. That is not true with competition provisions. *United States v. United States Gypsum Co.*, 442 U.S. 422, 441 n.17 (1979). Conduct that increases output and lowers prices to consumers is treated by competition policy as *beneficial*.

The Tenth Circuit's rule threatens growing arrangements that have proved very efficient. O.K., like many other poultry dealers, operates not just in the Tenth Circuit (Oklahoma) but also in the Eighth (Arkansas). The Tenth Circuit has given growers in Oklahoma an advantage their colleagues in Arkansas do not enjoy, even though both operate under the same contract and conditions. If O.K. must conform

its conduct to varying interpretations of the PSA, then it has no choice but to comply with the most stringent rule. That constitutes precisely the sort of "excessive deterrence" against which this Court has warned and which the other circuits, through implementation of market power screens and appropriate cabining of the quick look analysis derived from *Indiana Federation*, have avoided. This conundrum is intolerable for the efficient operation of an interstate business, particularly in an industry as important as food. The Court should resolve the conflict and establish a uniform policy for this vital industry.

II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT

While the conflicts between the Tenth Circuit's decision and those of other circuits suffice to warrant review, that need is bolstered by conflicts between the Tenth Circuit's decision and controlling authority from this Court. *See* S. Ct. Rule 10(c).

1. The Tenth Circuit proceeded on the assumption that *Indiana Federation* approves actual effects evidence to prove injury to competition in all cases. This Court has narrowly circumscribed its use, saying the industry analysis is not required to prove the anticompetitive effects of *horizontal* agreements, *Cal Dental Ass'n.*, 526 U.S. at 770. A much deeper analysis is required for vertical agreements, and in such cases this Court has never approved a finding of market power where the defendant held a share lower than 30%. *See Jefferson Parish,* 466 U.S. at 26-27; *see also Times-Picayune Publ'g Co. v. United*

States, 345 U.S. 594 (1953). The record below exhibited no "market imperfections" that would support a departure from this rule: the product is fungible; it is sold in expressly competitive circumstances to sophisticated buyers; there are no barriers to competitive entry by other firms whose supply could increase if they chose, like O.K., to run overtime and purchase extra chicks from third parties. There are many substitutes for chicken meat. Demand was not shown to be highly inelastic. In the absence of structural imperfections on the output side, the only possible imperfection on the input side is the lawful monopsony that O.K. holds over part of the area where it purchases its inputs, and this "restraint" was not shown to have diminished its production, where its practice was to distribute every chick its hatcheries generated for ultimate production to the market.

2. The Tenth Circuit thought O.K.'s alleged monopsony was economically significant, and *Been I* issued five predictions: O.K.'s aggregate production would decrease; the number of growers selling to it would decrease; each grower's sales volume would decrease; prices paid growers would decrease; consumer prices would rise. 495 F.3d at 1232; App. 56-57a. Not one came true over the ten-year period surveyed (1997-2007).

Monopsony is the mirror image of monopoly, and similar legal standards apply to both. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007). Monopoly, *simpliciter*, violates no law. *Pac. Bell Tel. Co. v. Linkline Comm'ns, Inc.*, 129 S. Ct. 1109, 1118 (2009). It is not the possession of monopoly power, but the abuse of that power that violates the law. *Olympia Equip. Leasing Co. v.*

Western Union Tel. Co., 797 F.2d 370, 374 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987). The PSA condemns an anticompetitive "practice or device," but not status.

The Tenth Circuit has in this case adopted an unsustainable view of what constitutes "anticompetitive practices." *Been I* said that when wholesale prices are weak, O.K. delays sending chicks to growers, 495 F.3d at 1232; App. 59-60a. *Been II* scored O.K. for increasing its production beyond capacity to meet unexpected demand, suggesting by this datum that all other production is "reduced." 2010 WL 3995981 at *8; App. 18a. In each instance, O.K. was responding to demand, not manipulating it. The Tenth Circuit has condemned a monopsonist for purchasing services at its perceived optimal level, conduct that would never be held against even a very large-market monopoly that sold its goods and services at its perceived optimal level, even though that meant buying fewer inputs.

Contrary to the Tenth Circuit's conceptions, O.K. cannot leverage its monopsony into power in the output market. Legal scholars and economists consistently note that where monopsonies sell into a competitive market, price and total output are unaffected. IIB Areeda & Hovenkamp, *Antitrust Law, supra*; Roger Blair & Jeffrey Harrison, *Antitrust Policy and Monopsony*, 76 Cornell L. Rev. 297, 305 (1991) (any monopsony output reduction will not affect market price when the monopsist sells its output in a competitive market). This is true because if the monopsony reduces production "other competitors... expand by an equal amount... market output remains the same because other competitors (purchasing in other input markets) take up the slack." Stephen C.

Salop, *Anticompetitive Overbuying by Power Buyers*, 72 Antitrust L. J. 669, 673 (2005). Professors Areeda and Hovenkamp note that a seller to a monopsony will not decrease output unless its marginal costs increase. XII Areeda & Hovenkamp, *Antitrust Law* ¶ 2011b, at 127 n.8 (2d ed. 2003). In vertically-integrated production, processors bear the marginal costs of increased output: chicks, feed, medicine, and delivery. Considerations such as these caused the *Weyerhaeuser* Court to recognize that monopsonistic practices present less of a direct threat of consumer harm because they can "succeed with little or no effect on consumer price," 549 U.S. at 324. Sometimes input savings can be shared with consumers to increase market share. *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 928 (1st Cir. 1984) (Breyer, J.) (lower premiums), *cert denied*, 471 U.S. 1029 (1985).

Here, it is undisputed that O.K. has only a 2% share of the output market, which is simply too trivial to permit it to raise chicken prices in a national chicken market. *Jefferson Parish*, 466 U.S. at 26-27; *Rothery*, 792 F.2d at 217; *see also* Easterbrook, *supra,* at 20 ("[f]irms that lack power cannot injure competition no matter how hard they try"). Thus, any monopsony power it purportedly exercises in the purchase of growing services in eastern Oklahoma would not translate into supracompetitive prices in the national chicken market because any reduction in O.K.'s output would be offset by other chicken producers. The Tenth Circuit's decision, in short, rests on an economic impossibility.

3. The court below apparently believed that the testimony of plaintiffs' economic expert could compensate for contrary market facts. *Been II*, 2010

WL 3995981 at *9 (stating that plaintiffs' expert's testimony is sufficient to support the judgment in this case notwithstanding undisputed market facts showing that O.K. lacked market power); App. 19a. But, again, this Court has said just the opposite. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), expressly rejects the notion that expert testimony can overcome market facts that demonstrate a lack of injury to competition. In *Brooke Group*, the Court held that the undisputed market facts showing increased output and reduced prices made it unreasonable "to conclude that Brown & Williamson threatened in a serious way to restrict output, raise prices above a competitive level, and artificially slow the growth of the economy segment of the national cigarette market." *Id.* at 242. It then noted that the plaintiff's expert had testified to the contrary:

> To be sure, [plaintiffs'] economic expert explained [plaintiff's] theory of predatory price discrimination and testified that he believed it created a reasonable possibility that Brown & Williamson could injure competition in the United States cigarette market as a whole. But this does not alter our analysis. When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.

Id.

The conflict between *Brooke Group* and this case is stark. Here, the undisputed record facts established that O.K.'s output grew by 65% over the relevant period. Overall chicken output in the United States grew one-third, some 12 billion pounds, and both real

and nominal prices for chicken fell. In addition, it is undisputed that O.K. has but a 2% market share in the market for the sale of chicken in the United States and sells the vast bulk of its products through competitive bidding. Against these objective market facts that suggest a lack – if not impossibility – of any market-wide output restriction producing uncompetitively-high prices, the Tenth Circuit weighed the testimony of plaintiffs' expert and held it sufficient to sustain the judgment "notwithstanding O.K.'s evidence of its purported lack of market power." *Been II*, 2010 WL 3995981 at *9; App. 19a. The Tenth Circuit's decision, therefore, directly contradicts the holding in *Brooke Group*.

This Court has insisted that competition cases must "make economic sense." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *see also United States v. Syufy Enters.*, 903 F.2d 659, 663 (9th Cir. 1990) ("all antitrust cases . . . must make economic sense"). "When the factual context renders the claim implausible," then plaintiffs are obligated to adduce "*more persuasive evidence* to support their claim than would otherwise be necessary." *Matsushita*, 475 U.S. at 587 (emphasis added). The Court has not retreated from these principles. Indeed, it recently applied them to the pleading stage of antitrust cases, requiring plaintiffs to "state a claim to relief that is plausible on its face" before imposing the cost of discovery on defendants. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

Abandoning these principles, however, the Tenth Circuit imposed a relaxed, low-threshold standard in which the testimony of an expert witness and undisputed objective market facts are placed side by

side with a lay jury to pick which version of reality it prefers. *Brooke Group* expressly rejected that approach. Even the trial court recognized the incongruity between the outcome in this case and economic reality. In denying O.K.'s motion for judgment as a matter of law, the trial judge pointedly stated that "[e]ven now [after the conclusion of the trial], this court is uncertain how this case makes economic sense." App. 84-85a. That uncertainty exists because, in fact, the case makes no economic sense. At bottom, the Tenth Circuit has analyzed a case involving the competitive effects of a routine business practice in a manner that this Court has expressly rejected. Such a clear conflict with this Court's decisions warrants review.

III. PARTIES SUING "LIVE POULTRY DEALERS" FOR "UNFAIR PRACTICES" UNDER THE PACKERS AND STOCKYARDS ACT MUST SHOW THAT THE LIVE POULTRY DEALER USED PRACTICES "WITH RESPECT TO LIVE POULTRY" TO RESTRICT THE PRODUCTION OF ACTUAL ANIMALS

Been I noted that O.K., by actively directing its own production, controls how many chicks each grower gets and when. This control permits O.K. to direct how much meat from its facility is produced to the consumer. *Been I* at 1233; App. 57a. At trial, O.K. showed – and Respondents did not dispute – that all chicks hatched at its facilities were distributed for growing. O.K. urged that the PSA's limitation to practices "with respect to live poultry" required Respondents to show that production of actual animals was suppressed. The Tenth Circuit rejected that argument.

A grant of certiorari is appropriate when a statute concerns "the importance of the issue for the agricultural community and for the administration of the antitrust laws." *Nat'l Broiler Mfg. Assn. v. United States,* 436 U.S. 816, 820 (1978). The Tenth Circuit below viewed O.K.'s argument as one of simple sufficiency, and sufficiently answered by the fact that production was perceived to vary. Respondents *conceded* that aggregate production (the only metric of interest to consumers) was unaffected by O.K.'s density practices, and could not dispute that O.K. produced to the physical capacity of its owned resources, only that production varied, and the chicks had to be coming from somewhere. But hatch rates vary and so does the ability to buy extra chicks. Chicks will come from somewhere at non-uniform rates. The Tenth Circuit's disregard of plaintiffs' admissions in analyzing the competitive effects of O.K.'s practices, sever the connection between the statutory language and business realities in agriculture. Animal production will *always* vary. It will vary *significantly* in O.K.'s case depending on how many extra chicks are available for purchase from points as far away as South Carolina and Georgia. Sometimes it can get none, sometimes as many as 200,000 a week. That difference alone will result in a production variance of 8%.[4] The Tenth

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[4] Respondents contend that O.K. can always buy 200,000 extra chicks a week if it will only pay enough for them. That argument is punctured by the observation in *Pickett*, 420 F.3d at 1283, that "[o]f course, in hypotheticals where economic constraints are assumed away, economic problems are not problems – Tyson is an actual business that operates in the real world through real markets where there are real economic limits. Tyson has competitors who stand ready, willing, and able to undercut the price of its product if it pays too much for

Circuit cited O.K.'s president's testimony that the company will increase production to meet unexpected demand as evidence that O.K.'s production at all other times is "reduced," without considering repeated testimony that at other times, not as many live chicks can be purchased. This makes economic sense. If general demand is low, breeder hatcheries will themselves not produce as much stock from which chicks-for-market can be purchased.

Congress amended the PSA in 1987 to afford poultry growers the same payment and statutory trust protections that cattle owners enjoyed. H. Rep. No. 100-397 at 5-16, *reprinted in* 1987 U.S.C.C.A.N. 855-65. It is not the PSA's function to "level the playing field" between farmers and dealers. *IBP*, 187 F.3d at 977. It is most especially not the PSA's function to specify the prices that must be paid in animal markets. *Swift & Co. v. Wallace*, 105 F.2d 848, 853 (7th Cir. 1939). That is, however, precisely what the jury was allowed to do, in deciding that O.K. should have paid growers 4.69¢ per pound in 1998, instead of the 4.3¢ its popular contract offered, a finding that cannot be based on "reduced production," because 1998's production was 20% higher than 1997's, in consequence of an expansion to O.K.'s principal hatchery.

[inputs]." *Seemingly*, all would be well if O.K. had paid it Growers 4.7¢ per pound in 1997. At that level they would enjoy a level of revenue satisfactory to them, but there is no evidence that it would have produced an additional pound of chicken. Yet that was the theory of Respondents' expert and on which the Tenth Circuit rested its judgment. This sort of economic musing divorced from commercial reality led the Eleventh Circuit to state that Respondents' expert, who also testified for the plaintiffs in *Pickett*, was "nuts." *Id.* at 1279 n.7.

The PSA was enacted to regulate livestock "in commerce." *Stafford v. Wallace* contemporaneously interpreted the PSA saying, "the object to be secured by the Act is the free and unburdened flow of livestock" from farm to market. 258 U.S. at 515. If "live poultry" do not exist, there is no "commerce" or "flow" to regulate, and nothing to which the Act's jurisdiction can sensibly attach. O.K. owns hatcheries; those hatcheries can produce so many chicks. That is the only "flow" that the PSA has jurisdiction to regulate.

In view of the evidence of actual capacity production, the trial judge deemed Petitioner's argument "ingenious" but flawed because *Been I*, in his view, held that production by monopsony is inherently reduced. App. 83-84a. Reduced, though, is a relative term. The Tenth Circuit below resisted the commonsense interpretation that would have judged production as being reduced if the defendant failed to produce all the animals that it controlled, reasoning that the PSA is remedial and should be interpreted broadly. 2010 WL 3995981 at * 8; App. 17a. Yet liberal construction of a remedial statute must at some point confront economic reality. Otherwise the statute will stifle the commercial competition that it seeks to foster.

Obliging O.K. to supply a specific number of chicks to each grower, beyond the live poultry it has in its control, would effectively compel it to enter commercial transactions that it considers uneconomic. Alternatively, O.K. would be forced to invest in more hatcheries and plants. But even with extra investment, its "monopsony" would be unchanged,

and O.K. (which can do nothing on its own to alter its status with respect to growers in Oklahoma) would still face trial after trial by growers under monopsony who want more chicks and more feed delivered to them, at no charge, so as to increase their opportunities.

The Tenth Circuit's decision has real-world consequences that transcend this case. Under its ruling, any live poultry dealer that ever produces in excess of its capacity by purchasing extra chicks and running plants overtime to meet unexpected demand, must always continue to do so or risk PSA liability. The rule emerging from the decision penalizes pro-competitive behavior and creates disincentives for live poultry dealers to expand output.

More generally, while the Tenth Circuit did not choose to publish *Been II*, it did publish *Been I*, and the trial judge noted that *Been I* was unclear. App. 92-93a. As the cases shown in footnote 3, *supra*, attest, litigation over poultry growing arrangements under the PSA is escalating. *Been II* will, then, be extensively cited by litigants precisely because it "clarifies" that production at capacity is no defense, that production variations used to meet high demand suffice to prove reduced production at all other times, and that small market shares are no defense, even when one resells in an expressly competitive market. These odd rules arise because a small-market monopsony exists that was presumed to have five anticompetitive effects, not one of which was realized even though operations and effects were scrutinized across ten years. This Court has cautioned against crafting legal rules that authorize a search for a particular type of undesirable circumstance, but end up discouraging legitimate competition. *Matsushita*, 475 U.S. at 594 (quoting *Barry Wright Corp. v. ITT*

Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.)). That is precisely what the Tenth Circuit's decision does here. The Court should review it.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 08-7078
(D.C. No. 6:CV-02-00285-RAW)
(E. D. Okla)

CHARLES BEEN, individually, d/b/a Creekside Farm, Inc.; DONALD FROST; EDWIN JOHNSTON; BOB FIELDS, individually, d/b/a Okie Blue Sky Farm, Inc.; GENE BLACKWELL,
Plaintiffs-Appellees,

v.

O.K. INDUSTRIES, INC., an Arkansas corporation and as administrator of health and benefit plans; O.K. FOODS, INC., an Arkansas corporation and as administrator of health and benefit plans; O.K. FARMS, INC., an Arkansas corporation and as administrator of health and benefit plans; O.K. BROILER FARMS LIMITED PARTNERSHIP, an Arkansas limited partnership and as administrator health and benefit plans,
Defendants-Appellants.

ORDER AND JUDGMENT*

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 (eff. Dec. 1, 2006) and 10th Cir. R. 32.1 (eff. Jan. 1, 2007).

Before BRISCOE, Chief Judge, BALDOCK, and GORSUCH, Circuit Judges.

Plaintiffs-Appellees ("Growers") filed this action alleging that Defendants-Appellants O.K. Industries, Inc., O.K. Farms, Inc., O.K. Foods, Inc., and O.K. Broiler Farms Limited Partnership (collectively "OK") violated § 202(a) of the Packers and Stockyards Act (PSA), 7 U.S.C. § 192(a). After a jury trial, the Growers prevailed on their claim and were awarded $21,141,975, which the district court reduced to $14,511,935. OK appeals, arguing: (1) the Growers failed to prove that OK engaged in an unfair practice "with respect to live poultry" under the PSA; (2) the Growers failed to prove that OK's allegedly unfair practices injured consumers and that OK had sufficient market power in the output market; (3) there was insufficient evidence to support two of the five possible theories of liability; (4) the district court erroneously admitted expert testimony; and (5) the district court failed to instruct the jury on the statute of limitations. As discussed below, we have jurisdiction pursuant to 28 U.S.C. § 1291, and affirm.

I

OK is a vertically integrated poultry producer operating in Arkansas and Oklahoma, and it is the largest poultry integrator in Oklahoma. OK is involved in almost every stage of the production and wholesale of poultry. However, OK does not handle the raising of broiler chickens to slaughtering age, but instead enters into contracts with various "growers" who raise the chickens.

Under OK's standard, non-negotiable contracts, these growers agree to use only chicks and supplies provided by OK. The individual growers also agree not to sell their chickens to other poultry integrators. In turn, OK agrees to provide a grower with only one flock of chicks, which typically takes seven weeks to raise. Then, OK may provide the grower with replacement flocks. Additionally, OK requires each grower to obtain financing and build chicken houses to OK's specifications, which can cost nearly $160,000. OK periodically requires growers to update their chicken houses to meet recent updated specifications.

Plaintiffs-Appellees are a class of growers operating in Oklahoma under contract with OK. They brought this suit alleging, in part, that the terms of OK's non-negotiable contracts and OK's performance under those contracts violate the PSA as unfair practices.

OK filed a motion for summary judgment, and the district court ruled that the PSA required proof of injury to competition, and the Growers failed to establish a genuine issue of material fact regarding competitive injury. The district court granted summary judgment for OK on the PSA claims, as well as on state law claims of unconscionability. The Growers appealed the grant of summary judgment.

On appeal, we held that "a plaintiff who challenges a practice under [PSA] § 202(a) [must] show that the practice injures or is likely to injure competition." *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1230 (10th Cir. 2007). Applying that holding to the evidence presented by the parties on summary judgment, we first concluded that "[t]he record contain[ed] evidence that support[ed] the Growers' contention that OK

[wa]s a monopsony in the relevant regional market." *Id.* at 1231.[1] We in turn held that, "to establish that the practices of a monopsonist have injured or are likely to injure competition, a plaintiff does not have to be a competitor of the buyer or demonstrate that the buyer has improperly excluded other competitors. Instead, the plaintiff must show that the monopsonist's practices have caused or are likely to cause the anticompetitive effect associated with monopsonies, namely the arbitrary manipulation of market prices by unilaterally depressing seller prices on the input market with the effect (or likely effect) of increasing prices on the output market." *Id.* at 1232. We ultimately concluded "that a genuine issue of material fact exist[ed] as to whether OK engaged in unfair practices in violation of § 202(a)." *Id.* at 1233. "In particular, we note[d] that the record contain[ed] evidence," most notably "expert testimony," "of the classic monopsony injury, namely that OK [wa]s depressing the prices it pa[id] the Growers and reselling at inflated prices." *Id.* We thus reversed the district court's grant of summary judgment for OK on the PSA claim but affirmed the grant of summary judgment regarding the unconscionability of the contracts under state law.

The case proceeded to a jury trial, where the Growers alleged five specific unfair practices that purportedly caused competitive injury in violation of the

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[1] A monopsony is a "condition of the market in which there is but one buyer for a particular commodity." *Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1133 n.4 (10th Cir. 2002) (internal quotation marks omitted). "As such, a monopsony is to the buy side of the market what a monopoly is to the sell side . . . ." *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312, 320 (2007).

PSA. The Growers offered testimony that: (1) OK exercised extensive control over the Growers in almost every aspect of production and pay; (2) OK increased the number of days between chicken flocks that it placed with the Growers; (3) OK reduced the number of chickens per square foot of housing space, or "bird density," placed with the Growers; (4) OK exercised control over the specifications for the chicken houses; and (5) OK shared detailed information with other integrators in the form of "Agri Stats," but did not share this information with the Growers, leading to a severe asymmetry of information.

At trial, the Growers offered the expert testimony of Dr. C. Robert Taylor, a professor of agricultural economics, who concluded that each of the above practices reduced production, depressed Grower pay compared to competitive-market levels, and likely increased output prices. Taylor also testified that OK's production practices impacted immediate resale and national prices, conclusions he reached after performing four regression analyses.

Taylor further testified regarding his methodology for calculating the Growers' damages. Taylor calculated the difference between the profits that the Growers actually received and the profits they would have earned in a competitive market, i.e., one free of the alleged violations of the PSA. He concluded that OK underpaid the Growers by up to $14,511,935 as a result of their violations during the class period. OK repeatedly objected to Taylor's testimony, requesting an opportunity to voir dire the witness. The district court denied each request, stating that OK would have its opportunity on cross-examination. Following cross-examination, there was no request to exclude Taylor's testimony, in whole or in part.

The jury returned a verdict, finding that OK violated § 202(a) of the PSA, and awarded the Growers $21,141,975. The district court entered judgment reflecting the verdict and damages on March 25, 2008. On April 8, 2008, OK filed motions for judgment as a matter of law and for a new trial. On July 3, 2008, the district court denied OK's motion for judgment as a matter of law, and it denied OK's motion for a new trial on the condition that the Growers consent to remittitur, reducing the damages to $14,511,935. The district court stated that it would enter an amended judgment upon Grower's acceptance of the remittitur. The Growers consented to the remittitur on July 14, 2008, by filing a document titled "Plaintiffs' Consent to Remittitur," but the district court never entered an amended judgment after that consent was filed. On August 7, 2008, the Growers and OK stipulated to dismissing with prejudice all remaining individual claims.

OK filed a notice of appeal on August 12, 2008.

II

A. Appellate Jurisdiction

Before considering the merits of this appeal, we must determine whether we have appellate jurisdiction. We raised this issue *sua sponte* and have received supplemental briefing from the parties.

Generally, we have jurisdiction only over "final decisions" from the district courts. 28 U.S.C. § 1291. In a civil case, a notice of appeal must be filed within thirty days after the entry of judgment. Fed. R. App. P. 4(a)(1)(A). However, when a party files a motion for a new trial, "the time to file an appeal runs for all parties from the entry of the order disposing of" that motion. Fed. R. App. P. 4(a)(4)(A)(v).

Here, OK filed a motion for a new trial after the district court entered a judgment reflecting the jury's verdict and award of damages. The district court then conditionally denied OK's motion, after raising *sua sponte* the issue of remittitur. Specifically, the district court's July 3, 2008 order stated:

> It is the Order of the Court that the motion of the defendants for new trial . . . is hereby DENIED . . . . The court suggests remittitur of the damages award to $14,511,935. Plaintiffs are given ten days from the date of this order to file a consent to remittitur, at which time an amended judgment will be entered. If plaintiffs do not consent to the remittitur, a new trial as to damages will be ordered.

Appellees' App. at 93. The Growers filed a document labeled "Plaintiffs' Consent to Remittitur" with the district court, stating: "Pursuant to the Court's Order of July 3, 2008, Plaintiffs hereby consent to remittitur of the damages award in this case from $21,141,975 to $14,511,935." Appellees' App. at 94. However, the district court never entered an amended judgment after the Growers filed their consent to remittitur.

The critical issue in the present case is whether OK could have filed an appeal once the Growers consented to the remittitur, or if OK was required to wait for the district court to enter an amended judgment. Other circuits have considered this issue, with conflicting results.

The majority of our sister circuits that have considered this issue have concluded that acceptance of remittitur renders the district court's decision final. The Eleventh Circuit was faced with an identical

situation in *Wright v. Preferred Research, Inc.*, 891 F.2d 886 (11th Cir. 1990) (per curiam). In *Wright*, the district court denied the defendant's motion for new trial on the condition that the plaintiff consent to remittitur. *See id.* at 888. The Eleventh Circuit stated: "When [plaintiff] accepted the remittitur . . . the judgment became final and appealable, actuating the 30-day period within which a notice of appeal must be filed." *Id.*; *see also Mauriello v. Univ. of Medicine and Dentistry of N.J.*, 781 F.2d 46, 49 (3d Cir. 1986) ("The question is whether the judgment became final when the remittitur order was entered or when the plaintiff's acceptance was filed. We conclude that the latter date is determinative for computing the time for appeal."); *Howell v. Marmpegaso Compania Naviera, S.A.*, 566 F.2d 992, 993 (5th Cir. 1978) (per curiam) (concluding that the plaintiff's "acceptance of the remittitur rendered the judgment final and appealable, and actuated the 30-day time limit within which notice of appeal must be filed").

On the other hand, the Sixth Circuit appears to require entry of a separate, amended judgment before a party may appeal from remittitur. *See Anderson v. Roberson*, 249 F.3d 539, 542–43 (6th Cir. 2001). In Anderson, the jury returned its verdict for the plaintiffs, and the defendants filed motions for judgment as a matter of law, new trial, and remittitur. *Id.* at 541. The district court ruled that defendants would be granted a new trial if plaintiffs rejected the remittitur. *Id.* Although it was unclear whether the plaintiffs ever actually accepted or rejected the remittitur, the Sixth Circuit reasoned:

> Both plaintiffs and defendants have missed the point. Once the district court entered its order giving the plaintiffs the choice between accepting

> the remittitur or having a new trial, there was no final order from which the parties could appeal. The parties appear to believe that the plaintiffs' action—either accepting or rejecting the remittitur—ends the district court's jurisdiction and opens the door for the case to proceed on appeal. The parties are mistaken. Except for those well-defined occasions when we have jurisdiction over an interlocutory appeal, we do not have jurisdiction over an appeal until the district court issues a final, appealable order. . . . Until the district court either enters a final order based upon the plaintiffs' election to accept the remittitur, or proceeds to judgment after a new trial, there is nothing for this court to review.

Id. at 542–43 (citations omitted).

The Growers also direct our attention to language from the Second Circuit's opinion in *Ortiz-Del Valle v. Nat'l Basketball Ass'n*, 190 F.3d 598, 600 (2d Cir. 1999) (per curiam). In *Ortiz-Del Valle*, the district court denied the defendant's motion for a new trial conditioned upon plaintiff's acceptance of a new trial or remittitur. *Id.* at 599. The plaintiff rejected the remittitur and opted for a new trial. *Id.* The defendants appealed, arguing that the order conditionally denying the motion for a new trial was final and appealable on the date of entry of that order. *Id.* The Second Circuit disagreed, and noted in dicta that "[w]here the plaintiff elects the remittitur, the defendant's time for filing the notice of appeal runs from the date of entry of the amended judgment reduced as a result of the remittitur. *See* Fed. R. Civ. P. 58 (judgment not effective until set forth in separate document and entered on civil docket) . . . ." *Id.* at 600. The Growers contend that this language

supports the conclusion that we lack jurisdiction until the district court enters a separate, amended judgment. We disagree.

The above-quoted language from *Ortiz-Del Valle* does not speak to the finality of the district court's decision. Rather, the quoted portion of the Second Circuit's ruling addresses only the running of the time to file a notice of appeal, explicitly relying on Federal Rule of Civil Procedure 58. Under the version of Rule 58 and the Federal Rules of Appellate Procedure in effect in 1999, some courts had held that the time to file a notice of appeal began to run only once a separate judgment was entered; if a district court never entered a separate judgment, the time to appeal never began to run. *See* Fed. R. Civ. P. 58 advisory committee's note (2002 amendments); *see also Casey v. Long Island R.R. Co.*, 406 F.3d 142, 148 (2d Cir. 2005). However, in 2002, the Federal Rules of Civil and Appellate Procedure were amended to address this problem and ensure that the time to appeal was not indefinite. *See* Fed. R. Civ. P. 58 advisory committee's note (2002 amendments). Therefore, the Second Circuit's opinion that "the defendant's time for filing the notice of appeal runs from the date of entry of the amended judgment," *Ortiz-Del Valle*, 190 F.3d at 600, is not helpful in resolving the jurisdictional issue in the present appeal.

If anything, the reasoning in *Ortiz-Del Valle* supports the conclusion that an order becomes final on the date that a party consents to remittitur. Notably, the Second Circuit stated that "[t]he motion [for a new trial] . . . was disposed of on the date when plaintiff rejected the remittitur and instead opted for a new trial." *Ortiz-Del Valle*, 190 F.3d at 600. By the same logic, OK's motion for a new trial would have

been disposed of on the date when Growers consented to the remittitur.

We find the reasoning of the Third, Fifth, and Eleventh Circuits to be more persuasive. When a district court enters an order denying a motion for a new trial on the condition that a plaintiff accept a remittitur for specified damages, the decision is deemed final once the plaintiff accepts the remittitur. "For a ruling to be final, 'it must end the litigation on the merits, and the [district court] must clearly declare [its] intention in this respect.'" *Harbert v. Healthcare Serv. Group, Inc.*, 391 F.3d 1140, 1145 (10th Cir. 2004) (quoting *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 273–74 (1991)). A final decision leaves nothing for the district court but to execute the judgment. *Id.* "[T]he touchstone of a final order is a decision by the court that a party shall recover only a sum certain." *Id.* (internal quotation marks omitted). In the case at bar, liability had already been determined, and damages were set by the district court and the Growers' consent. *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 86 (2000) ("[T]he term 'final decision' . . . is a decision that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment." (internal quotation marks omitted)). Accordingly, Growers' acceptance of the remittitur rendered the district court's order final. *See Howell*, 566 F.2d at 993.

Although the district court stated that it would enter an amended judgment after the Growers consented to the remittitur, that fact does not affect our appellate jurisdiction. The district court's decision was final regardless of the court's failure to file a separate judgment. We find persuasive a recent deci-

sion of the *Seventh Circuit, Davis v. Advocate Health Center Patient Care Express*, 523 F.3d 681 (7th Cir. 2008). In *Davis*, the district court gave the plaintiff twenty-five days to pay a filing fee and "noted that if [he] failed to comply with that deadline, his suit would be dismissed." *Id.* at 683. The plaintiff never paid the fee, but instead, he waited for the deadline to pass and then filed a notice of appeal. *Id.* The Seventh Circuit acknowledged that "the district court stated a plan to enter a final judgment in [twenty-five] days unless [the plaintiff] paid his fee, and when [he] refused to pay the fee the court neglected to follow through with its plan," and enter a separate order dismissing the case. *Id.* Nonetheless, the Seventh Circuit concluded that the "suit ha[d] ended at the district court level," and thus, the decision was final and appealable. *See id.*

Similarly, although the district court in the case at bar did not follow through with its plan to enter an amended judgment reflecting the reduced damages, the decision was nonetheless final upon the Growers' consent to the remittitur. The district court indicated its intent that its decision was final, explicitly ordering that the Growers had ten days to consent to the remittitur, "at which time an amended judgment *will be* entered." Appellees' App. at 93 (emphasis added); *see Davis*, 523 F.3d at 683 ("[T]he district court ordered that, unless [plaintiff] paid his fee, the case *would be* dismissed (though the court never actually issued a separate order carrying out that threat)."). All that remained at the district court level was for the "ministerial" act of entering an amended judgment. *See Star Ins. Co. v. Risk Mktg. Group Inc.*, 561 F.3d 656, 658 (7th Cir. 2009) ("[O]rders that specifically contemplate further activity in the district court are generally not final. However, if an

order contemplates only ministerial actions by the court, finality may exist." (citations and internal quotation marks omitted)); *see also Thompson v. Gibson*, 289 F.3d 1218, 1221 (10th Cir. 2002) ("[P]reparing and entering a judgment is a ministerial task that can be easily and routinely performed by the Clerk of the Court or his deputies.").

Additionally, even though an amended judgment was never set out in a separate document, we still have jurisdiction over the final decision of the district court. Generally, "[e]very judgment and amended judgment must be set out in a separate document . . . ." Fed. R. Civ. P. 58(a). However, "a separate document is not required for an order disposing of a motion . . . for a new trial, or to alter or amend the judgment, under Rule 59 . . . ." Fed. R. Civ. P. 58(a)(4); *but see* Fed. R. Civ. P. 58 advisory committee's note (2002 amendments) ("[I]f disposition of the [Rule 59] motion results in an amended judgment, the amended judgment must be set forth on a separate document."); *Employers Ins. of Wausau v. Titan Int'l, Inc.*, 400 F.3d 486, 489 (7th Cir. 2005) (concluding that an order granting a motion for an amended judgment requires a separate document).

We need not decide whether the district court's order—which denied OK's motion for a new trial, but amended the award of damages—required entry of a separate document. Even if the district court should have entered an amended judgment in a separate document, "[a] failure to set forth a judgment or order on a separate document . . . does not affect the validity of an appeal from that judgment or order." Fed. R. App. P. 4(a)(7)(B).

Moreover, we note that the separate-document requirement does not affect the timeliness of this appeal. Generally, if a separate document is not required, then a judgment or order is considered entered when it is entered in the docket. Fed. R. App. P. 4(a)(7)(A)(I); *see also* Fed. R. Civ. P. 58(c)(1).[2] If, on the other hand, a separate document is required, then the judgment or order is considered entered when it is entered in the docket "and when the earlier of these events occurs: [1] the judgment or order is set forth on a separate document, or [2] 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a)." Fed. R. App. P. 4(a)(7)(A)(ii); *see also* Fed. R. Civ. P. 58(c)(2).[3] OK filed its notice of appeal within thirty days of the Growers' consent to remittitur. Thus, under either scenario, the appeal was timely. *See* Fed. R. App. P. 4(a)(4)(A).

Additionally, we note when OK filed its notice of appeal, there were no individual claims pending before the district court. When the Growers consented to the remittitur on July 14, individual plaintiffs still had unresolved claims against OK. "As a general matter, a judgment in a consolidated action that does not dispose of all claims is not considered a

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[2] Although, as discussed above, the district court's order conditionally denying the motion for a new trial was not final when it was entered. Rather, it became final once the Growers satisfied the district court's condition of consenting to the remittitur. *See Davis*, 523 F.3d at 683 ("[M]ore than 150 days have passed since [plaintiff's] deadline to pay the fee, and the separate document requirement is now moot.").

[3] In such a case, although the notice of appeal would have been premature when filed, it would have been effective when the judgment was deemed entered, Fed. R. App. P. 4(a)(2), 150 days after consent to remittitur. *Cf. Davis*, 523 F.3d at 683.

final appealable decision under § 1291." *Jackson v. Volvo Trucks N. Am., Inc.*, 462 F.3d 1234, 1238 (10th Cir. 2006). On the other hand, "where [a] dismissal finally disposes of [a] case so that it is not subject to further proceedings in federal court, the dismissal is final and appealable." *Id.* (internal quotation marks omitted). And here, the individual plaintiffs and OK stipulated to dismissing *with prejudice* the remaining claims on August 7, 2008. *See Green Tree*, 531 U.S. at 86 ("The District Court's order . . . dismissed respondent's claims with prejudice, leaving the court nothing to do but execute the judgment. That order plainly disposed of the entire case on the merits and left no part of it pending before the court."); *Rabbi Jacob Joseph Sch. v. Province of Mendoza*, 425 F.3d 207, 210 (2d Cir. 2005) ("Immediate appeal is available to a party willing to suffer voluntarily the district court's dismissal of the whole action *with prejudice* . . . ."). Thus, when OK filed its notice of appeal, there were no other claims pending before the district court.[4]

Because OK filed a timely notice of appeal from a final decision of the district court, we have jurisdiction over this appeal. Accordingly, we turn to the merits of OK's arguments.[5]

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[4] Growers accepted the remittitur on July 14, 2008, and OK then timely filed its notice of appeal on August 12, 2008. We offer no opinion on whether the time to file a notice of appeal may be tolled until the remaining claims were dismissed with prejudice because OK's notice of appeal was timely from the date of the Growers' acceptance of the remittitur.

[5] The Growers request that we should direct the district court to enter an amended judgment, and inform the district court that it has jurisdiction to act on a motion dated July 18th regarding collateral matters such as costs and fees. Whether the

B. Merits

OK argues on appeal that several trial errors require that the judgment be reversed and dismissed, or in the alternative, a new trial should be granted. Specifically, OK contends (1) the Growers failed to prove that OK used an unfair practice "with respect to live poultry" under the PSA; (2) the Growers failed to prove that OK had sufficient market power in the output market; (3) there was insufficient evidence to support two of the five possible theories of liability; (4) the district court erroneously admitted expert testimony; and (5) the district court failed to instruct the jury on the statute of limitations. As outlined below, we reject each of these contentions.

1. The meaning of an unfair practice "with respect to live poultry"

OK argues that the PSA requires the Growers to prove that OK used an unfair practice with respect to actual, live birds that have already hatched. In particular, OK argues that under the statute, the Growers were required to show that OK produced certain actual, live chicks, and then either destroyed them or otherwise refused to allow the Growers to raise them. We review issues of statutory interpretation de novo, beginning with the plain language of the text and interpreting "the words of the statute in light of the purposes Congress sought to serve." *Been*, 495 F.3d at 1227 (internal quotation marks omitted).

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district court retains jurisdiction over any remaining collateral matters has not been presented as an issue on appeal. Our role is not to advise the district court regarding motions that may currently be pending.

Section 202 of the PSA provides: "It shall be unlawful . . . for any live poultry dealer with respect to live poultry, to: (a) Engage in or use any unfair . . . practice or device . . . ." 7 U.S.C. § 192. In interpreting this statute, we are mindful that the PSA is a remedial statute, and thus, it is to be "construed liberally in accord with its purpose to prevent economic harm to producers and consumers at the expense of middlemen." *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968). "[T]he primary purpose of the PSA [was] to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry and to safeguard farmers against receiving less than the true market value of their livestock." *Been*, 495 F.3d at 1228 (alterations omitted) (internal quotation marks omitted).

OK contends that the PSA applies only to unfair practices involving chickens that have actually hatched. This argument is without merit. As we have previously recognized, price manipulation in the form of arbitrarily reducing production may violate the PSA as an unfair practice. *See Been*, 495 F.3d at 1233–34. And a practice that reduces chick production by incubating fewer eggs, for example, is a practice "with respect to live poultry" as much as a practice that reduces chick production by destroying chicks that have already hatched. Both practices result in fewer live chickens being delivered to the Growers to raise and sell back to OK. Thus, either way, OK is reducing the price it pays its Growers for live poultry. In light of plain statutory language and the remedial purpose of the PSA, we reject OK's strained interpretation of the phrase "with respect to live poultry."

Additionally, OK asserts that it cannot be held liable because it delivered all the chicks that it could produce. Conceivably, this is an argument that OK was entitled to a new trial based on insufficient evidence to prove that OK actually reduced production in violation of the PSA. "Where a new trial motion asserts that the jury verdict is not supported by the evidence, the verdict must stand unless it is clearly, decidedly, or overwhelmingly against the weight of the evidence." *Anaeme v. Diagnostek, Inc.*, 164 F.3d 1275, 1284 (10th Cir. 1999) (internal quotation marks omitted). We review the evidence "in the light most favorable to the prevailing party . . . ." *Id.* Upon review of the record, there was sufficient evidence to support the verdict.

OK contends that it could not have reduced the chick population because it always operated its hatcheries at full capacity. But at trial, the Growers' expert, Dr. Taylor, testified that his regression analysis indicated "that when [OK's] returns are low, then they increase days out between flocks which depresses total grower pay." Appellants' App. at 304. Taylor acknowledged that he did not have any knowledge of OK's hatchery capacity, but testified that OK's production levels could vary and the evidence of days between flocks "implies that somewhere they're getting the chicks to put out there." Appellants' App. at 358. Additionally, OK's president testified that production levels vary depending on demand. Viewing this evidence in the light most favorably to the Growers, we conclude that there was sufficient evidence that OK's production levels varied, and that OK did not always operate at full capacity.

2. OK's alleged lack of market power

Next, OK argues that because it only has a 2% share of the national poultry market, it necessarily lacked the power to raise consumer prices by suppressing production. OK first raised this argument in its motion for summary judgment, following remand, and renewed it in its post-trial motion for judgment as a matter of law. We review de novo the district court's denial of a motion for judgment as a matter of law. *Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs*, 613 F.3d 1229, 1235 (10th Cir. 2010).

We conclude, after reviewing the trial record, that the district court did not err in denying OK's motion for judgment as a matter of law. The Growers' expert, Taylor, opined that OK's production practices impacted immediate resale and national prices. That testimony, notwithstanding OK's own evidence of its purported lack of market power, was sufficient in our view both to create a genuine issue of material fact as to whether OK's production practices "over time [were] likely to increase consumer prices for [OK's] products in comparison to what prices would have been but for the practice,"[6] Aplee. Supp. App. at 412 (jury instructions), and to support the jury's verdict in favor of the Growers. *See generally FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse

[6] We reach no conclusion as to whether the district court correctly instructed the jury that, as to one of the two alternate methods of proof relied on by the Growers at trial, the Growers were required to prove that OK's practices over time were likely to increase consumer prices for OK's products.

effects on competition, proof of actual detrimental effects . . . can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.") (internal quotation marks omitted).

3. Sufficiency of the evidence to support all the theories of liability

OK argues that the general verdict returned by the jury must be overturned and the case remanded for new trial because the Growers failed to present sufficient evidence to establish that two of the five challenged practices, i.e., OK's possession of asymmetrical information and OK's requirements regarding housing specifications, resulted in consumer injury.

The Growers correctly note that OK has not preserved this issue for appeal. "To preserve a sufficiency of the evidence claim for appellate review, a party must move for summary judgment as a matter of law (directed verdict) under Federal Rule of Civil Procedure 50(a) at the close of the evidence." *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1228 (10th Cir. 2000). "Failure to sufficiently raise an issue in a [Rule 50(a)] motion . . . bars appellate review of that issue." *Miller v. Eby Realty Group LLC*, 396 F.3d 1105, 1114 (10th Cir. 2005). We do not require technical precision, but liberally construe the Rule 50(a) motion, asking whether the moving party adequately notified the district court of the issues raised. *See id.*

In the first Rule 50(a) motion, at the end of the Growers' case, OK's arguments focused on the statute of limitations, the statutory meaning of "with respect to live poultry," and the theory of liability based on

density reductions.[7] Then, OK renewed its motion at the close of all the evidence. At that time, OK added that there was insufficient evidence regarding the commodity market and consumer injury, and regarding any decrease in production (arguments similar to those asserted in its summary judgment motion). Nowhere in the Rule 50(a) motions did OK discuss or even mention liability based on asymmetrical information or housing specifications.[8]

OK first raised these issues in its post-judgment motion for new trial.[9] The Growers correctly noted in

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[7] At the outset of its arguments, OK's counsel stated: "we would renew our motion for summary judgment on the [PSA] . . . ." Appellant's App. at 423. In its motion for summary judgment, OK argued, under a heading entitled "THERE IS NO EVIDENCE THAT O.K.'S CONDUCT WAS LIKELY TO INJURE COMPETITION IN A RELEVANT MARKET," Appellant's App. at 73, that (a) the majority of the birds processed by OK were dedicated to negotiated, one-year, fixed-price contracts with buyers like Burger King and Wendy's, and as a result, was unable to reduce its production significantly, (b) OK only held a 2% market share in the United States and was thus unable to control prices or eliminate competition, and (c) the average retail price per pound for whole chickens at the time of trial was lower than it was in 2001. *Id.* at 19-20. Nowhere in its summary judgment motion did OK assert the sufficiency of evidence argument it now seeks to assert on appeal.

[8] Nor were these arguments discussed or mentioned in OK's post-trial motion for judgment as a matter of law. That motion instead argued that (a) the Growers failed to produce any evidence that OK sold its products directly to consumers, and (b) the Growers' statistical evidence was insufficient to establish consumer injury.

[9] In its motion for new trial, OK complained for the first time that the Growers had failed to present sufficient evidence to establish that three of the practices challenged by the Growers (i.e., "density reduction," "information sharing," and "building

their response to that motion that, under Tenth Circuit law, OK waived any right to a new trial on the basis of insufficiency of the evidence by failing to raise the issues in its Rule 50(a) motions. "A party may not circumvent Rule 50(a) by raising for the first time in a post-trial motion issues not raised in an earlier motion for directed verdict." *United Int'l Holdings*, 210 F.3d at 1228. The Rule 50(a) motion "is a prerequisite to a post-verdict motion under Rule 50(b). The renewed motion cannot assert grounds for relief not asserted in the original motion." *Marshall v. Columbia Lea Reg'l Hosp.*, 474 F.3d 733, 738 (10th Cir. 2007) (footnote omitted). Because OK did not address these two arguments in its Rule 50(a) motion, we will not consider them on appeal.[10]

4. Admission of Expert Testimony

Next, OK argues that the district court erroneously admitted evidence presented by the Growers' expert witness, Dr. Taylor. Under the Federal Rules of Evidence, the district court must ensure that an expert's testimony is relevant and reliable. *Daubert v.*

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specification control") resulted in consumer injury. Appellant's App. at 757-762.

[10] Although the district court discussed these arguments on the merits in its denial of OK's post-judgment motion for a new trial, we are not bound by that action. And, even if we were to ignore OK's procedural default, it would be unnecessary to address OK's arguments on the merits because, by challenging the sufficiency of evidence with respect to only two of the five theories of liability submitted to the jury, it has effectively conceded that sufficient evidence existed to support the jury's general verdict. *See Nanodetex Corp. v. Defiant Tech.*, 349 F. App'x 312, 317-18 (10th Cir. 2009) ("Because the case was tried using a general verdict, we do not know which theory the jury adopted and consequently must affirm if legally sufficient evidence exists to support either theory.").

Merrill Dow Pharm., 509 U.S. 579, 589 (1993). Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Generally, there are two separate inquiries in addressing whether a district court properly admitted an expert's testimony. First, "we review de novo whether the district court applied the proper standard and actually performed its gatekeeper role in the first instance." *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003). We then review for an abuse of discretion the manner in which the district court exercises its gatekeeping role in deciding whether to admit or exclude expert testimony. *Id.* Because the district court has "broad discretion" in deciding whether to admit or exclude such testimony, we "will not disturb the district court's ruling unless it is arbitrary, capricious, whimsical or manifestly unreasonable or when we are convinced that the district court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.* (internal quotation marks omitted).

OK contends that the district court committed several errors in admitting Taylor's testimony. OK argues that the district court improperly admitted testimony regarding the level of asymmetrical infor-

mation, the calculation of damages, and causation of consumer injury.

a. Testimony Regarding Asymmetrical Information

Beginning with Taylor's testimony regarding asymmetrical information, OK argues that Taylor provided no gauge, test, or data for measuring the severity of the asymmetry. At trial, Taylor testified that the problems of asymmetrical information "are much more severe when it's way out of whack." Appellants' App. at 328. When questioned, Taylor agreed that there is no published economic analysis of what constitutes "way out of whack." Appellants' App. at 331–32.

On appeal, OK argues that it was error to admit this "*ipse dixit*" conclusion. But at trial, OK did not object to this testimony on those grounds. OK's only objections to the testimony regarding asymmetrical information involved the *relevance* of the testimony.[11] OK did not object on the grounds of reliability under Rule 702 and *Daubert*. Because OK did not object to the expert testimony at trial on the same grounds that they argue on appeal, we review only for plain error. *See McKenzie v. Benton*, 388 F.3d 1342, 1350 (10th Cir. 2004) (reviewing for plain error where

[11] Although OK filed a motion to exclude Taylor's testimony, the district court did not rule on the issue of asymmetrical information, but instead stated that it would "monitor this testimony closely." Appellants' Add. at 34. Thus, it was OK's responsibility to make a timely, specific objection to the particular testimony offered at trial. *See Mathea Murrelet v. Babbitt*, 83 F.3d 1060, 1066 (9th Cir. 1996) ("[T]he appropriate time to raise Daubert challenges is at trial. By failing to object to evidence at trial and request a ruling on such an objection, a party waives the right to raise admissibility issues on appeal.").

party objected to expert testimony on qualification, but argued relevance on appeal).

To establish plain error, OK must demonstrate "(1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Morales-Fernandez v. INS*, 418 F.3d 1116, 1123–24 (10th Cir. 2005). This final requirement "is an extraordinary, nearly insurmountable burden." *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 802 (10th Cir. 2001). Notably, OK never mentions the plain error standard in its appellate briefs, nor marshals its arguments accordingly, and "[f]or that reason alone, we [could] conclude [it] has failed to carry the nearly insurmountable burden that the plain error standard imposes." *Herrera v. City of Albuquerque*, 589 F.3d 1064, 1075 (10th Cir. 2009) (citations omitted) (internal quotation marks omitted). Nonetheless, reviewing OK's arguments, it has not met its burden to demonstrate plain error.

Reviewing Taylor's testimony, he did not provide specific data, or a gauge by which to measure the severity of asymmetrical information, which he described as "way out of whack." Even assuming that this was error, OK has not met the high burden of demonstrating plain error resulting in manifest injustice. The jury did not need to rely on Taylor's opinion testimony because the jury had evidence of the information that was actually provided to the Growers and the information allegedly withheld. Additionally, the theory regarding asymmetry of information was only one of five potential theories of liability. Thus, OK has not shown plain error resulting in manifest injustice in admitting Taylor's

testimony regarding the asymmetry of information. *See McKenzie*, 388 F.3d at 1350–51.

b. Testimony Regarding Damages

OK further contends that the district court erroneously admitted evidence regarding the measurement of damages. In support, OK appears to make two separate arguments. First, OK suggests that the district court erroneously instructed the jury on damages. Second, OK argues that Taylor's testimony on damages was irrelevant and unreliable.

i. Jury instructions regarding damages

Turning to the jury instructions, we review the jury instructions as a whole de novo to determine whether the district court "correctly stated the governing law and provided the jury with an ample understanding of the issues and applicable standards." *Martinez v. Caterpillar, Inc.*, 572 F.3d 1129, 1132 (10th Cir. 2009) (internal quotation marks omitted). We review for abuse of discretion the district court's decision to give a particular instruction. *Id.* "We reverse only in those cases where we have a substantial doubt whether the jury was fairly guided in its deliberations." *Id.* (alterations omitted) (internal quotation marks omitted).

> The district court instructed the jury on damages in part as follows:
>
> when determining plaintiffs' lost profits, you should compare the amount of profit that plaintiffs would have earned in a fair and competitive market with the amount of profit that plaintiffs have earned. The difference between these two figures is the amount of profits the plaintiffs lost because of defendants' alleged violation of the PSA.

Appellees' Supp. App. at 420. Upon reviewing the jury instructions, we conclude the district court did not err in allowing the jury to calculate damages based on the profits that the Growers actually received in comparison to profits in a hypothetical competitive market.

In competitive injury cases, it is often difficult to measure business damages. *See J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981). "The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *Id.* In a typical antitrust competitive injury case, damages are calculated "by comparison of profits, prices and values as affected by the [unlawful act], with what they would have been in its absence under freely competitive conditions." *See Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946) (discussing damages in monopolization under the Sherman Act); *see also Nat'l Farmers' Org., Inc. v. Associated Milk Producers, Inc.*, 850 F.2d 1286, 1306 (8th Cir. 1988) ("At base, an antitrust plaintiff's damages should reflect the difference between its performance in a hypothetical market free of all antitrust violations and its actual performance in the market infected by the anticompetitive conduct."). We find no error in the district court instructing the jury to compare what the Growers actually received with what they would have received in a competitive marketplace, absent OK's violations of the PSA.

ii. Testimony calculating damages

Next, OK argues that the district court erred in admitting Taylor's testimony regarding damages. More specifically, OK contends that testimony regarding competitive pay was irrelevant, and Taylor's

metric for calculating damages was erroneously admitted.

Beginning with the issue of relevance, OK's argument is without merit. As discussed above, the district court appropriately instructed the jury on calculating damages by comparing profits received and profits in a hypothetical, competitive market. Naturally, testimony regarding underpayment in reference to such a competitive market would be relevant.

Turning to Taylor's metric for calculating damages, OK contends that there were two errors in Taylor's methodology: (1) Dr. Taylor used cost assumptions in a model developed for Alabama, not Oklahoma; and (2) the damages model included the opportunity costs of grower labor.

OK failed to object to Taylor's use of Alabama figures in the damages model. In the pretrial motion to exclude Taylor's testimony, OK mentioned in passing that Taylor used assumptions from Alabama in the motion to exclude his testimony, but it did not argue that the use of data from Alabama was unreliable or improper under *Daubert*, as is now suggested on appeal. And at trial, OK did not object to Taylor's testimony regarding the use of data from Alabama. Consequently, we review for plain error. *McKenzie*, 388 F.3d at 1350.

Upon reviewing the record, we conclude that there was no plain error in admitting the testimony regarding damages using data from Alabama. OK contends that the use of data from Alabama has previously been criticized. *See Wheeler v. Pilgrim's Pride, Inc.*, 246 F.R.D. 532, 542–43 (E.D. Tex. 2007). But in *Wheeler*, the district court noted that the

expert made no attempt to compare the Alabama data to the relevant market or members of the class. *See id.* at 543. Additionally, the expert in *Wheeler* conceded that he did not use the best information available. *See id.* In the present case, however, Taylor testified that the Alabama data was "the only source of actual information detail on . . . the out-of-pocket cost for raising broilers." Appellants' App. at 340–41. Further, Taylor also examined the operating costs on an actual OK farm and compared them to the Alabama data. Taylor testified that the Alabama data he used resulted in lower damages than if he used the figure from the actual OK farm. If the calculations are "estimated in any reasonable way" and the expert's assumptions "are not without support in the record, the calculations may be upheld . . . ." *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1526 (10th Cir. 1984) (emphasis omitted) (internal quotation marks omitted). Accordingly, OK has not demonstrated plain error.

Next, we turn to OK's argument that the district court erroneously allowed Taylor to testify about a damages model that included opportunity costs. OK did not object to Taylor's use of opportunity costs in either the motion to exclude Taylor's testimony or during trial, and thus, we review only for plain error. *See McKenzie*, 388 F.3d at 1350.

OK contends that courts have disapproved of the use of opportunity costs as a matter of law. But this assertion is an extreme overstatement. Courts refer to "opportunity costs" in a wide variety of contexts, often using the term in several different ways. *See Fishman v. Estate of Wirtz*, 807 F.2d 520, 556 (7th Cir. 1986) ("The economic concept of 'opportunity cost' has been used in a variety of cases as a loose

label for any of a number of adjustments to value involving the idea that for every use of one's resources there is an alternative use, with its own return, foregone."). Thus, whether "opportunity costs" are admissible depends on the context of a given case.

OK has not argued how the use of opportunity costs is improper in the calculation of damages using a hypothetical competitive market. Instead, OK relies on two district court cases involving predatory pricing: *In re IBM Peripheral EDP Devices Antitrust Litigation*, 459 F. Supp. 626, 631 (N.D. Cal. 1978), and *Continental Airlines, Inc. v. American Airlines, Inc.*, 824 F. Supp. 689, 701 (S.D. Tex. 1993). Neither case, however, is relevant to the determination of whether it was plain error to use opportunity costs to calculate damages using a hypothetical competitive market. Therefore, OK has not established it was error, let alone plain error for the district court to admit testimony regarding opportunity costs.

c. Testimony regarding consumer injury

OK also argues that Taylor's testimony on causation of consumer injury was inadmissible. Specifically, OK argues that Taylor testified at a professionally impermissible level of confidence, and Taylor erroneously calculated the time difference between when OK decided to produce chickens and when it obtained a price.

At trial, Taylor testified that there was a 71 % probability that OK's production has an impact on the nationwide price. Appellants' App. at 316. OK does not contest the relevance of the evidence or the method used to calculate the relationship between OK's production and nationwide prices, but instead asserts that the 71% confidence level renders the

testimony inadmissible. We need not resolve the precise confidence level at which such testimony becomes inadmissible. Even assuming the challenged testimony was inadmissible, it was harmless in the context of all the evidence produced by the Growers. As noted by the Growers, they presented four regression analyses demonstrating actual harm to consumers, and OK does not challenge two of those analyses.

Next, OK argues that the district court erred in admitting Taylor's testimony regarding the relationship between OK's production decisions and average sales prices. Specifically, OK contends that Taylor mistakenly assumed that the decision to produce was made on the day OK delivered chicks to the Growers, rather than when OK chose to hatch the chicks three weeks prior. Therefore, OK argues that Taylor correlated market prices and production levels using the wrong time interval.

Again, OK has failed to properly preserve this issue for appeal. At trial, OK objected to the admission of this evidence, suggesting that there were reliability questions and asked to voir dire the witness. Appellants' App. at 307. The district court refused to allow OK to voir dire Taylor at that time, and instead told OK that it would have the opportunity to bring out issues of reliability on cross-examination. But after cross-examining Taylor, OK never moved to exclude Taylor's testimony or otherwise requested a ruling on the admissibility of his testimony under Rule 702. Thus, the district court was never asked to make specific findings on the record analyzing the admissibility of Taylor's testimony under *Daubert*. Accordingly, we review for plain error. *See McKenzie*, 388 F.3d at 1350. And, after examining the record on

appeal, we are not persuaded the admission of this evidence, even if erroneous, resulted in a miscarriage of justice.

5. Statute of Limitations

Finally, OK argues that the district court failed to instruct the jury on the statute of limitations. However, OK did not request such an instruction on the record during the jury instruction conference. Where a party fails to make a proper objection to jury instructions, we review for plain error. *Greene v. Safeway Stores, Inc.*, 210 F.3d 1237, 1245 (10th Cir. 2000). "Under that standard, we will affirm unless the instructions were patently, plainly erroneous and prejudicial." *Id.* (internal quotation marks omitted).

OK contends that the general verdict allowed the jury to find OK liable based on its control over building specifications. According to OK, the named plaintiffs entered into their contracts with OK outside the statute of limitations period, and thus, OK was entitled to an instruction on the statute of limitations. Although the district court noted that OK never raised this specific objection on the record during the jury instruction conference, the district court discussed the statute of limitations argument in denying OK's motion for a new trial. The district court concluded that a statute of limitations instruction was not required because of the continuing harm and speculative damages doctrines.

OK argues that the continuing harm doctrine was rejected in a similar case, citing *Varner v. Peterson Farms*, 371 F.3d 1011, 1019 (8th Cir. 2004). But unlike the plaintiffs in *Varner*, the Growers did not allege that they were harmed based on an enforcement of the original contract entered before the

statute of limitations. Rather, the Growers argued, and provided evidence, that the Growers and OK repeatedly entered new contracts throughout the period of the statute of limitations, and those contracts demanded new building specifications, which the Growers alleged violated the PSA. OK offers no other argument regarding the continuing harm doctrine save for its misplaced reliance on *Varner*. Therefore, we conclude that OK has failed to demonstrate that the instructions were patently, plainly erroneous and prejudicial.

The judgment of the district court is AFFIRMED.

Entered for the Court

Mary Beck Briscoe
Chief Judge

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 05-7079

(D. Ct. No. 02-CV-285-W)

CHARLES BEEN, individually and d/b/a Creekside Farm, Inc.; DONALD FROST; EDWIN JOHNSTON; BOB FIELDS, individually and dba Okie Blue Sky Farm, Inc.; GENE BLACKWELL, Class Representatives,

Plaintiffs - Appellants,

v.

O.K. INDUSTRIES, INC.; O.K. FOODS, INC.; O.K. FARMS, INC., all Arkansas corporations, individually and as administrators of health and benefit plans; O.K. BROILER FARMS LIMITED PARTNERSHIP, an Arkansas limited partnership, individually and as administrator of health and benefit plans; COLLIER WENDEROTH, JR.; RANDALL GOINS; TOM WEBB, individually and as trustees of health and benefit plans; OK INDUSTRIES, INC. EMPLOYEE BENEFIT PLAN; OK INDUSTRIES, INC. EMPLOYEE FUNDED GROUP HEALTH CARE PLAN; OK INDUSTRIES, INC. AND ITS SUBSIDIARIES EMPLOYEE FUNDED HEALTH CARE PLAN; OK INDUSTRIES, INC. AND AFFILIATES FLEXIBLE BENEFITS/HEALTH CARE PLAN; OK INDUSTRIES, INC. AND AFFILIATES FLEXIBLE BENEFITS PLAN; RETIREMENT SAVINGS PLAN OF OK INDUSTRIES, INC. AND SUBSIDIARIES; RETIREMENT SAVINGS PLAN OF OK INDUSTRIES, INC.; GROUP LONG TERM DISABILITY PLAN; GROUP LIFE HEALTH INSURANCE PLAN; GROUP VOLUNTARY TERM LIFE INSURANCE PLAN; KEN PRIMM,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

(D. Ct. No. 02-CV-285-W)

Charles B. Goodwin and Harry A. Woods, Jr. (Mack J. Morgan, III, Christopher B. Woods, and Amanda L. Maxfield, with them on the briefs), Crowe & Dunlevy, P.C., Oklahoma City, Oklahoma, appearing for the Appellants.

Matthew Horan, Smith, Maurras, Cohen, Redd & Horan, PLC, Fort Smith, Arkansas (James M. Sturdivan and Ronald N. Ricketts, Gable & Gotwals, P.C., Tulsa, Oklahoma, and Don A. Smith, Smith, Maurras, Cohen, Redd & Horan, PLC, Fort Smith, Arkansas, with him on the briefs), appearing for the Appellees.

Before TACHA, *Chief Circuit Judge*, BRISCOE, and HARTZ, *Circuit Judges*.

TACHA, Chief *Circuit Judge*.

This appeal presents a matter of first impression for this Circuit, namely whether § 202(a) of the Packers and Stockyards Act ("PSA"), 7 U.S.C. § 181 et seq., requires a plaintiff to prove that an allegedly "unfair practice" injures or is likely to injure competition. The District Court held that such proof is required and, finding that the Plaintiffs had failed to present any evidence of a competitive injury, granted summary judgment in favor of the Defendants. The court also granted the Defendants' motion for summary judgment on the Plaintiffs' state law claim

of unconscionability. We take jurisdiction under 28 U.S.C. § 1291, and for the reasons that follow, we affirm in part and reverse in part, remanding to the District Court for further proceedings consistent with this opinion.

I. BACKGROUND

Defendants-Appellants OK Industries, OK Farms, Inc., and OK Foods, Inc. (collectively "OK") constitute a vertically integrated poultry producer operating in Arkansas and Oklahoma. OK is involved in almost every stage of the production and wholesale of poultry and poultry products: it breeds, hatches, provides feed for, transports, slaughters, and processes poultry. One aspect of poultry production OK does not handle is the raising of broiler chickens to slaughtering age. OK enters into contracts with various "growers" who handle that part of the production process.

The Plaintiffs-Appellants ("Growers") are a class of growers operating in Oklahoma under contract with OK. In addition to alleging that the process by which OK and its growers enter into contracts is unconscionable under Arkansas law, the Growers argue that the terms of the contracts, as well as OK's performance under the contracts, violate the Packers and Stockyards Act, 7 U.S.C. § 181 et seq. Their claims hinge on the following undisputed facts.

OK is the largest poultry integrator in Oklahoma. With limited exceptions, no other integrators operate in the geographic markets in which OK operates. At the time of this lawsuit, OK had a waiting list of over 130 persons desiring to become growers for OK or to expand their existing operations. When OK needs to expand its production, it contacts persons on the

waiting list to determine whether they are still interested, and if so, whether they will be suitable growers. Prior to entering into a contract with a grower, OK requires the grower to first obtain financing and build chicken houses to specifications set by OK. In exchange for a grower's expenditure of money to build the requisite chicken houses, OK signs a letter of intent, agreeing to enter into a broiler contract with the grower upon satisfactory completion of the chicken houses. One chicken house can cost a grower nearly $160,000, not including the cost of land and equipment.

All the broiler contracts are materially identical; they are standard contracts drafted by OK and are not subject to negotiation. Under the standard contract, a grower agrees to use only chicks, feed, and medicine supplied by OK. OK is not liable, however, for any loss a grower incurs as a result of OK's failure to provide feed and supplies; nor is OK liable for birds condemned due to certain diseases. The contract also provides that a grower may not sell its chickens to poultry integrators other than OK and may not transfer its broiler contract to other potential growers without OK's prior approval. Under the terms of the contract, OK agrees to provide the grower with only one flock of chicks, which typically takes a grower seven weeks to raise.[1] Thereafter, OK may provide the grower with replacement flocks "from time to time." In addition to deciding when to deliver replacement flocks, OK determines the breed of chicken, the number of chicks per flock, and the number of flocks. Furthermore, at the end of each growing cycle, OK

[1] Because of the large capital commitments needed to become a grower for OK, growers must typically raise chickens for fifteen to twenty-five years to recover their initial investment.

may require that a grower update its houses to meet OK's most recent specifications before it will place another flock of chicks with the grower. These required changes result in significant costs to growers.

The contract also details the method OK uses to calculate a grower's pay. OK uses a "competitive ranking" system to reward growers who produce chickens at the least cost to OK. Under OK's system of payment, OK first calculates the production cost per pound[2] of each grower's flock and labels this production cost the grower's "flock prime cost." It then lists the flock prime cost of each grower in order from lowest to highest. The flock prime cost of the grower that is numerically in the middle of the list is designated as the "average prime cost." If any individual grower's flock prime cost is less than the average prime cost, then OK pays that grower a higher rate per pound than those whose flock prime cost is higher than the average prime cost. In other words, a grower's pay is based on how growers in a group rank against each other, not on the individual grower's production.

The Growers in this case filed suit in the United States District Court for the Eastern District of Oklahoma. They obtained class certification to challenge the following conduct: (1) OK deducts from the Growers' pay certain charges for medicine and supplies; (2) OK sometimes delivers dead chicks to the Growers and causes the Growers to pay for them because OK counts chicks to be delivered at the

[2] The production cost per pound takes into account the weight of the chickens raised by growers, as well as the cost for chicks, medicine, and feed.

hatchery, rather than at the Growers' premises; and (3) OK has reduced the number of birds placed per year with the Growers, causing a substantial decrease in the Growers' income. The Growers also challenged OK's competitive ranking system, arguing it is unfair and unconscionable because (1) OK uses the median flock prime cost as the average prime cost, which alters the rankings in a way that benefits OK to the detriment of the Growers; (2) OK exercises control over factors affecting the Growers' performance; and (3) OK calculates the weight of condemned birds, for which OK will not pay Growers, based on the weight of healthy birds, even though condemned birds can weigh up to 50% less than healthy birds. The Growers alleged that OK's conduct constitutes a breach of contract and violates § 202(a) of the PSA, 7 U.S.C. § 192(a). They also alleged that the broiler contract is unconscionable and therefore unenforceable under state law.

OK moved for judgment on the pleadings, arguing, *inter alia*, that proof of an injury to competition is a required element of a claim brought under § 202(a) of the PSA. The district court judge denied OK's motion, holding that § 202(a) does not require proof of an injury to competition. Approximately eighteen months later, in a motion for summary judgment before a different district court judge, OK re-raised the issue. The Growers argued that the doctrine of the law of the case bound the District Court to its prior ruling and that § 202(a) did not require proof of an injury to competition. In the alternative, they argued that they had presented sufficient evidence of an injury to competition to withstand summary judgment. The court disagreed with all three arguments. After concluding that the law of the case did not bind the court to the prior ruling, the District Court held that

§ 202(a) requires proof that a practice injures or is likely to injure competition and that the Growers had failed to establish a genuine issue of material fact concerning competitive injury. Consequently, the court entered summary judgment in favor of OK on the Growers' PSA claim. The Growers then moved to reopen discovery for the purpose of determining whether OK's conduct injured or was likely to injure competition. The District Court denied the motion.

Subsequently, in response to a motion filed by the Growers for an interlocutory appeal, the District Court supplemented its summary judgment ruling disposing of the PSA claim. It held that, even if § 202(a) does not require a competitive injury, whether particular conduct is "unfair" within the meaning of § 202(a) is a question of law, and OK's conduct in this case was not "unfair" as a matter of law.

In yet another order, the District Court entered summary judgment in favor of OK on the Growers' unconscionability claim. With respect to the broiler contracts governed by Oklahoma law,[3] the court concluded that Oklahoma would not recognize an affirmative claim for damages based on unconscionability. With respect to the broiler contracts governed by Arkansas law, the court concluded that, although Arkansas recognizes an affirmative cause of action for unconscionability, the Arkansas courts have not specifically addressed an affirmative claim for damages, and in any event, these contracts were not unconscionable under Arkansas law.

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[3] Beginning in 1997, OK's broiler contracts included a choice-of-law provision designating the law of Arkansas as the governing law. The District Court therefore applied Arkansas law to those contracts and Oklahoma law to the contracts predating 1997.

Following these rulings, the parties settled the pending class claims for breach of contract. The Growers now appeal the District Court's rulings on their PSA and unconscionability claims.

II. DISCUSSION

A. The Packers and Stockyards Act § 202(a)

1. Law of the Case

The Growers first contend that the District Court's initial ruling that § 202(a) does not require proof of an injury to competition represents the law of the case, which should not be disturbed except in very narrow circumstances not present here. We disagree. Generally, the "law of the case" doctrine dictates that prior judicial decisions on rules of law govern the same issues in subsequent phases of the same case. *See Homans v. City of Albuquerque*, 366 F.3d 900, 904 (10th Cir. 2004). We have acknowledged, however, that "the rule is a flexible one that allows courts to depart from erroneous prior rulings, as the underlying policy of the rule is one of efficiency, not restraint of judicial power." *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 823 (10th Cir. 2007) (internal citation omitted). That is, the doctrine is merely a "presumption, one whose strength varies with the circumstances." *Avitia v. Metro. Club of Chicago, Inc.*, 49 F.3d 1219, 1227 (7th Cir. 1995); *see also Homans*, 366 F.3d at 904 ("[T]he doctrine is discretionary rather than mandatory."). If the original ruling was issued by a higher court, a district court should depart from the ruling only in exceptionally narrow circumstances. *See McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031, 1035 (10th Cir. 2000).[4] On the

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[4] This Court had recognized three "exceptionally narrow" grounds supporting a district court's departure from an appel-

other hand, district courts generally remain free to reconsider their earlier interlocutory orders. *Harlow v. Children's Hosp.*, 432 F.3d 50, 55 (1st Cir. 2005); *see also United States v. Smith*, 389 F.3d 944, 949 (9th Cir. 2004) (explaining that a district court may review its prior rulings so long as it retains jurisdiction over the case).

Finding no Supreme Court or Tenth Circuit authority interpreting § 202(a) to require proof of a competitive injury, the first district court judge denied OK's motion for judgment on the pleadings. In reviewing OK's motion for summary judgment eighteen months later, however, the second judge found persuasive authority from other circuits holding that such proof is required. In light of these circumstances and the interlocutory nature of the initial ruling, the District Court did not abuse its discretion in reconsidering the prior ruling. *See Harlow*, 432 F.3d at 55-56 (reviewing a district court's reconsideration of a prior interlocutory order for abuse of discretion).

2. Interpretation of "Unfair Practices" under § 202(a)

Section 202 of the PSA makes it unlawful for a "live poultry dealer"[5] to

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late court's earlier ruling: "(1) when the evidence in a subsequent trial is substantially different; (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice." *McIlravy*, 204 F.3d at 1035 (quotation omitted).

[5] It is undisputed that OK is a "live poultry dealer," defined as "any person engaged in the business of obtaining live poultry by purchase or under a poultry growing arrangement for the purpose of either slaughtering it or selling it for slaughter by another." 7 U.S.C. § 182(10).

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or

(b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or

(c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or

> sales of any article, or (3) to manipulate or control prices; or
>
> (g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.

7 U.S.C. § 192.

At issue in this case is only what constitutes an "unfair" practice within the meaning of § 202(a). The District Court held that an "unfair" practice is one that "injures or is likely to injure competition." The Growers contend that this interpretation of the statute is belied by the United States Department of Agriculture's ("USDA") interpretation, as well as the statute's plain language and purpose.

We first address the Growers' suggestion that we must defer to the USDA's reasonable interpretation of the statute because the agency is authorized to make rules and regulations necessary to carry out the PSA. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (holding that when Congress has implicitly delegated legislative authority to an agency, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency"). To that end, the Growers claim that the USDA "has consistently taken the position that in order to prove that any practice is 'unfair' under [§] 202(a) . . . of the Act, it is not necessary to prove predatory intent, competitive injury, or likelihood of injury; and that it is the Department's duty to stop unlawful practices in their incipiency prior to actual injury." *In re Ozark County Cattle Co., Inc.*, 49 Agric. Dec. 336, 365 (1990), 1990 WL 320312. They also

note that the USDA filed an amicus brief before the Eleventh Circuit in *London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir. 2005), *cert. denied*, 126 S.Ct. 752 (2005), stating that the Secretary of Agriculture's position is that the PSA prohibits all unfair practices, regardless of whether a practice causes a competitive injury.

Although we generally defer to an agency's interpretation of an ambiguous statute that it implements, "[d]ifferent types of agency pronouncements are entitled to different degrees of deference." *Newton v. FAA*, 457 F.3d 1133, 1136 (10th Cir. 2006). As the Supreme Court has explained:

> [A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

Regulations promulgated by an agency exercising its congressionally granted rule-making authority are clearly entitled to *Chevron* deference. *Newton*, 457 F.3d at 1137. So too is an agency's adjudication of matters over which it has the authority to adjudicate, as such decisions carry the force of law. *See id.; Southern Ute Indian Tribe v. Amoco Prod. Co.*, 119

F.3d 816, 832 (10th Cir. 1997) (recognizing the rule that an agency "may establish binding policy either through rule-making procedures or through adjudications that create binding precedents" (quotation omitted)), *rev'd on other grounds, Amoco Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865 (1999). Here, however, the Secretary has not promulgated a regulation applicable to the practices the Growers allege violate § 202(a), and the USDA has no authority to adjudicate alleged violations of § 202 by live poultry dealers. *See London*, 410 F.3d at 1304 (citing administrative complaint procedures under 7 U.S.C. § 193(a)); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1456-57 (8th Cir. 1995) (holding that the only means of enforcing § 202 against live poultry dealers is to file suit in federal district court under § 308, 7 U.S.C. § 209(a)).[6] Moreover, we afford the USDA's position as stated in its amicus brief before the Eleventh Circuit little to no deference. *See Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1315 (10th Cir. 2005) ("[A]micus briefs . . . do not reflect the deliberate exercise of interpretive authority that regulations and guidelines demonstrate." (quota-

[6] Under 7 U.S.C. § 209, any person subject to the PSA may be held liable for damages. Liability may be enforced either by complaint to the Secretary of Agriculture "as provided in section 210 of this title," or through proceedings instituted in federal district court. 7 U.S.C. § 209(b). Under 7 U.S.C. § 210, however, only stockyard owners, market agencies, and dealers (not including live poultry dealers) may be found liable in proceedings before the Secretary of Agriculture. In addition, the Secretary may issue cease and desist orders and assess civil penalties against packers and swine contractors, but not poultry dealers, under 7 U.S.C. § 193. In other words, the Secretary has no adjudicative authority over live poultry dealers. Hence, the only way to enforce § 202 of the PSA against a live poultry dealer is to file suit in federal district court under 7 U.S.C. § 209.

tion omitted)). The agency's views so stated "may be accepted by a court only as they have power to persuade." *First Am. Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166, 1174 (10th Cir. 2005) (citing Skidmore v. Swift, 323 U.S. 134, 140 (1944)). As we explain below, we are not persuaded by the USDA's interpretation of the statute.[7]

Having concluded that we need not defer to the agency's interpretation of the statute, we turn to the District Court's construction of § 202(a). We review issues of statutory construction de novo, "interpret[ing] the words of the statute in light of the purposes Congress sought to serve." *Wright v. Fed. Bureau of Prisons*, 451 F.3d 1231, 1233-34 (10th Cir. 2006) (quotation omitted). In so doing, we begin with "the language employed by Congress," and we "read the words of the statute in their context and with a view to their place in the overall statutory scheme." *Id.* at 1234 (quotation omitted).

As the Growers note, nothing in the plain language of § 202(a) indicates that a practice is unfair only if it

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[7] In addition, we emphasize that we are interpreting the meaning of unfairness solely in the context of the PSA. Consequently, the Supreme Court's decision in *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 233 (1972), which addresses similar language in § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), does not dictate a particular interpretation in this case. Unlike the case before us, the question in *Sperry and Hutchinson* was one of agency jurisdiction, namely whether § 5 empowered the FTC to define "unfair practices" to include practices without anticompetitive effects and of a noncompetitive nature. *Id.* at 239. Conversely, as we note above, the present case does not involve the USDA's interpretive or enforcement authority under the statute. Instead, we are faced with the task of construing a statute that only the federal courts may enforce against live poultry dealers.

adversely affects competition or is likely to do so. But neither does the statute otherwise define an unfair practice. Enacted in 1921, the "primary purpose of [the PSA] is to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry" and "to safeguard farmers . . . against receiving less than the true market value of their livestock." H.R. Rep. No. 85-1048, at 1 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5213, 5213. The "chief evil" Congress feared was the monopolistic practices of the packers, "enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer, who buys." *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922). Although intended to be broader than antecedent antitrust legislation, § 202 "nonetheless incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation." *De Jong Packing Co. v. USDA*, 618 F.2d 1329, 1335 n.7 (9th Cir. 1980).

Against this backdrop, other circuits have concluded that "unfair[ness]" under § 202(a) requires evidence that the challenged practice will likely lead to a competitive injury. The issue is most thoroughly treated in *Armour & Co. v. United States*, 402 F.2d 712 (7th Cir. 1968). *Armour* involved a meat packer's coupon promotion, which allegedly had the effect of diverting sales from competitors to the defendant. After recognizing the PSA's ancestry in antitrust law, where Congress has expressed a "basic public policy distinguishing between fair and vigorous competition on the one hand and predatory or controlled competition on the other," *id.* at 717, the court reasoned that the "fact that a given provision does not expressly specify the degree of injury or the type of intent required, does not imply that these basic indicators of

the line between free competition and predation are to be ignored," *id.* Even though the test of unfairness under § 202(a) is "less stringent than under some of the anti-trust laws," the court still concluded that the coupon program at issue could not violate § 202(a) "absent some predatory intent or some likelihood of competitive injury." Armour, 402 F.2d at 717;[8] *see also IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999)) (concluding that the challenged conduct did not "potentially suppress or reduce competition sufficient to be proscribed by the [PSA]"); *Parchman v. USDA*, 852 F.2d 858, 864 (6th Cir. 1988) ("[The PSA] does not require that the Secretary prove actual injury before a practice may be found unfair. The Secretary need only establish the likelihood that an arrangement will result in competitive injury to establish a violation." (alterations, internal quotation marks, and citation omitted)); *DeJong*, 618 F.2d at 1337 (holding that "unfair practices under § 202 are not confined to those where competitive injury has already resulted, but includes those where there is a reasonable likelihood that the purpose will be achieved and that the result will be an undue restraint of competition").

In a more recent case, based on facts similar to those at issue here, the Eleventh Circuit similarly held that a claim brought under § 202(a) required some showing of a competitive injury or the likelihood of competitive injury. *London*, 410 F.3d at 1303. Like the case before us, *London* involved a vertically

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[8] We are not concerned here with predatory intent on the part of OK. That issue was not raised by the parties, and we therefore express no opinion on whether evidence of predatory intent can make an act "unfair" when there is no concomitant showing of a likelihood of competitive injury.

integrated poultry company that entered into contracts with growers to raise broiler chickens. *Id.* at 1298-99. One grower filed suit against the company, arguing that the company violated the PSA when it terminated his broiler contract. *Id.* at 1299. After a jury returned a verdict in favor of the grower, the district court set aside the verdict and granted the defendant's motion for judgment as a matter of law. *Id.* at 1300. Relying in part on *Armour*, the Eleventh Circuit held that to prevail under § 202(a), a plaintiff must show that the defendant's practice "adversely affects competition or is likely to adversely affect competition." *Id.* at 1304. In reaching this decision, the court identified the policy implications of a contrary holding: "Eliminating the competitive impact requirement would ignore the long-time antitrust policies which formed the backbone of the PSA's creation. Failure to require a competitive impact showing would subject dealers to liability under the PSA for simple breach of contract . . . ." *Id.*

The Growers argue, however, that because § 202's other subsections contain language prohibiting acts that tend to restrain commerce or create monopolies, *see, e.g.*, 7 U.S.C. § 192(c), (d), (e), the absence of similar language in § 202(a) conclusively means that proof of a competitive injury is not required. We disagree. Unlike subsections (c), (d), and (e), which list specific acts that are unlawful only when they have the tendency or effect of restraining commerce or creating a monopoly, subsection (a) is a general prohibition on "unfair, unjustly discriminatory, or deceptive practice[s]" and provides no further guidance on what type of act falls within its parameters. Not to require a showing of competitive injury or the likelihood thereof would make a federal case out of

every breach of contract. Nothing in the PSA suggests that Congress intended this result.

The Growers also argue that because other subsections require proof of a competitive injury, limiting subsection (a) to anticompetitive acts would render it superfluous and would therefore violate one of the "cardinal principle[s] of statutory construction" to "give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (quotation omitted). To the contrary, such an interpretation is far from rendering subsection (a) superfluous because it serves as a catchall for acts that Congress could not, at the time of enactment, have foreseen and specified. *Cf. Excel Corp. v. USDA*, 397 F.3d 1285, 1293 (10th Cir. 2005) (recognizing that new techniques and tools utilized by covered entities can violate the PSA even if the USDA has not previously declared them unlawful). While the other subsections make certain acts explicitly unlawful, Congress acknowledged with subsection (a) that it could not list the full panoply of unfair, unjustly discriminatory, or deceptive practices or devices that a covered entity might utilize.

Although we have never expressly held that unfairness under § 202(a) requires a likelihood of injury to competition, our circuit precedent is not to the contrary. In resolving unfairness cases, we have often suggested that a showing of competitive injury can be determinative. In *Capitol Packing Co. v. United States*, 350 F.2d 67 (10th Cir. 1965), for example, we reviewed a decision issued by the USDA's Judicial Officer that various practices engaged in by the defendants violated § 312(a) of the PSA, 7 U.S.C. § 213(a), "which makes it unlawful for any market agency to engage in or use any unfair, unjustly

discriminatory, or deceptive practice or device in connection with the marketing or selling of livestock." *Capitol Packing Co.*, 350 F.2d at 73 (quotation omitted). The Judicial Officer found that a practice called "order buying" (i.e., the sale of livestock before it arrives at the stockyards) violated the PSA because the livestock had the misleading appearance of being for sale to the highest bidder by virtue of its presence in the market. *Id.* at 74. But this Court concluded, as a matter of law, that "order buying" was not a violation of § 312(a) in part because the record lacked "evidence . . . tending to show [order buying] *lessens competition*." *Id.* (emphasis added).

In *Excel Corp. v. USDA*, 397 F.3d 1285 (10th Cir. 2005), we reviewed the USDA's determination that Excel violated § 202(a) and one of the PSA's implementing regulations, 9 C.F.R.§ 201.99(a), by failing to disclose to hog producers a change in its formula for computing the weight of carcasses. Although it admitted that it had changed the formula, the meat packer argued that it had not violated the act because, *inter alia*, "practices are not violative where they are required by the exigencies of the business." *Excel Corp.*, 397 F.3d at 1293. We rejected this claim, stating that "Congress and the USDA are the arbiters of what practices will *impede competition*." *Id.* (emphasis added). Hence, "the fact that a particular act is 'required by the exigencies of the business' . . . has no impact on whether that act is violative of the [PSA] and the implementing regulations." *Id.* By failing to notify hog producers of the changed formula, Excel prevented the producers from shopping their hogs to other packers to determine if they could obtain a better price. In light of these facts, we upheld the Judicial Officer's conclusion that Excel's practice "impeded competition." *Id.* at 1294.

In *Hays Livestock Commission Co. v. Maly Livestock Commission Co.*, 498 F.2d 925, 929 (10th Cir. 1974), we reviewed the Secretary of Agriculture's determination that a dealer's refusal to honor a draft to pay for livestock was "unjust and unreasonable" under 7 U.S.C. § 208. In upholding the Secretary's decision, we did not discuss what a plaintiff must show to establish that a practice is unjust or unreasonable, but we did note that "dishonoring of drafts in this context . . . placed an inordinate burden on the barns, contrary to the purpose of the Packers and Stockyards Act to *secure the free and unburdened flow of livestock*." *Hays Livestock Comm'n*, 498 F.2d at 932 (emphasis added) (quotation omitted). Like our decisions in *Capitol Packing Co. and Excel Corp.*, our opinion in *Hays Livestock Commission* indicates that an impediment to competition, though never expressly required, was implicit in our prior decisions.

The Growers note, however, that we have also resolved cases under § 202(a) without any mention that the relevant practice injures competition. They direct our attention to *Peterman v. USDA*, 770 F.2d 888 (10th Cir. 1985), in which we upheld the Secretary's determination that a meat packer was guilty of deceptive trade practices, including its "bait and switch" tactic, whereby the packer would advertise one product and then convince customers seeking the product to buy a more expensive one instead. *Id.* at 890. To the extent our silence on the competitive injury requirement is relevant, this case is distinguishable because it involved an act alleged to be deceptive, as opposed to unfair. We are concerned here only with whether unfairness requires a showing of a likely injury to competition, not whether deceptive practices require such a showing. We therefore join the those circuits requiring a plaintiff who

challenges a practice under § 202(a) to show that the practice injures or is likely to injure competition.

3. OK's Alleged Violations of § 202(a)

After determining that § 202(a) requires proof of an injury or likely injury to competition, the District Court concluded that the Growers had failed to raise a genuine issue of material fact regarding competitive injury. We review the District Court's grant of summary judgment de novo, *Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114, 1124 (10th Cir. 2005), and will affirm its decision only if the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing the record, "we must view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Bryant*, 432 F.3d at 1124.

In granting summary judgment in OK's favor, the District Court held:

> To prove monopoly power typically requires the wilful acquisition or maintenance of such power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Monopoly power includes power to exclude competition. Plaintiffs have not presented evidence demonstrating entry barriers or other circumstances which improperly preclude other integrators from competing in this market with defendants. The mere fact that the defendants are the sole integrator does not demonstrate an illegal monopsony. Moreover, the plaintiffs are not competitors of defendants. Thus, injury to them by the allegedly "unfair" contract does not demonstrate injury to competition.

(internal citations omitted). The Growers argue that the District Court erred because it implied that (1) an injury to competition only arises in the context of unlawful monopolization; and (2) an injury to competition only arises when a competitor is injured.

We agree that the District Court erred in its legal analysis of what constitutes a competitive injury under § 202(a). As we noted above, Congress intended the PSA to have a broader scope than the antitrust laws. The antitrust requirement that monopoly power be acquired willfully and include the power to exclude competitors does not apply in the context of the PSA. By holding that § 202(a) requires proof that a practice has injured or is likely to injury competition, we have not required a showing that the defendant engaged in the unfair practice with the intent to cause the injury or other unlawful effect.[9] Instead, the Growers need only prove that specific practices have the *effect* of injuring competition or are likely to do so. Moreover, as we explain below, when analyzing whether a buyer's "monopsony" power injures competition, as in this case, the inquiry is somewhat different from the inquiry into whether a seller's monopoly power injures competition.

The record contains evidence that supports the Growers' contention that OK is a monopsony in the relevant regional market. A monopsony is "a condition of the market in which there is but one buyer for a particular commodity." *Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1133 n.4 (10th Cir. 2002)

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[9] Indeed, we have recognized that § 202(a) focuses on conduct and does not require proof of wrongful intent: "Nothing in the language of [§ 202(a)] . . . requires a showing of wrongful intent. To the contrary, the focus is solely on the acts committed or omitted." *Excel Corp.*, 397 F.3d at 1294.

(quotation omitted). Because the poultry market is vertically integrated, if OK is the only integrator in the area, as the Growers suggest, it may constitute a monopsony. The District Court's characterization of this logic as a "non sequitur" is therefore incorrect. We have previously acknowledged that a monopsony may exist when sellers are unable to find alternative buyers and must sell to a single purchaser. *Id.* at 1135-36.

Furthermore, we have acknowledged that, like a monopoly, a monopsony can threaten competition. *Id.* at 1135 ("Economists . . . have long recognized that market inefficiencies created by anticompetitive restraints on input markets can be as destructive of a free market economy (and therefore ultimately damaging to consumers) as restraints on output markets."). According to economists, without competition from other buyers, a monopsonist will lower prices paid to sellers, which over time results in higher consumer prices.[10] In other words, a poultry processor with monopsony power can fix and manipulate prices resulting in injury to both poultry producers (i.e., growers) and end-users (i.e., consumers). We explained why depression of prices potentially injures both producers and consumers in *Telecor*: "Some producers will either produce less or cease production altogether, resulting in less-than-optimal output of the product or service, and over the long run higher consumer prices, reduced product

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[10] The danger of increased consumer prices is especially acute when the monopsonist resells in a monopolized market. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, 3 ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 720a n.1 (2005).

quality, or substitution of less efficient alternative products." *Id.* at 1136.

In addition, in the vertically integrated poultry market, a processor with a monopsony need not wait for poultry growers to produce less to increase prices on the wholesale market because the processor also controls the growers' supply. It may simply deliver fewer chicks to the growers, pay them the same low prices, and resell at the same or a higher price. When this happens, both the growers and the end-users are adversely affected. That is, by manipulating prices to suppliers, a monopsonist threatens to injure the end-users. *Id.* at 1136 ("[M]onopsonies fall under antitrust purview because monopsonistic practices will eventually adversely affect consumers."); *id.* at 1134 ("Tenth Circuit case law . . . reject[s] the notion that a monopsony plaintiff must prove end-user impact."); *see also Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948) (holding that sugar beet growers had stated a valid monopsony claim under the Sherman Act even though they did not allege end-user impact). Hence, to establish that the practices of a monopsonist have injured or are likely to injure competition, a plaintiff does not have to be a competitor of the buyer or demonstrate that the buyer has improperly excluded other competitors. Instead, the plaintiff must show that the monopsonist's practices have caused or are likely to cause the anticompetitive effect associated with monopsonies, namely the arbitrary manipulation of market prices by unilaterally depressing seller prices on the input market with the effect (or likely effect) of increasing prices on the output market.

As we noted above, shortly after the PSA's passage, the Supreme Court identified these very harms as

the reason Congress passed the Act: the "'chief evil'" Congress sought to prevent was "'the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys.'" *Mahon v. Stowers*, 416 U.S. 100, 106 (1974) (quoting *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922)); *see also Swift & Co. v. United States*, 393 F.2d 247, 254 (7th Cir. 1968) ("The lack of competition between buyers, with the attendant possible depression of producers' prices, was one of the evils at which the Packers and Stockyards Act was directed."); *Bruhn's Freezer Meats of Chicago, Inc. v. USDA*, 438 F.2d 1332, 1337 (8th Cir. 1971) (noting one of the purposes of the PSA was "to assure fair trade practices in the livestock marketing and meat-packing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock"). Although Congress did not intend to "'upset the traditional principles of freedom of contract,'" *see Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005) (quoting *Jackson*, 53 F.3d at 1458), it did intend to prevent those practices that facilitate the packers' arbitrary manipulation of prices and complete subversion of normal market forces.

Although other circuits have noted that supply contracts between producers and processors of livestock can increase efficiency, they tend to focus on the benefits to the processor, rather than the market as a whole. *See Pickett*, 420 F.3d at 1283 ("[B]eing able to keep its processing plants operating at capacity has increased [the processor's] efficiency."); *IBP, Inc.*, 187 F.3d at 978 (concluding that the terms of the contracts allowed the processor "to have a more reliable and efficient method of obtaining a supply

of cattle"). But even if supply contracts increase a processor's efficiency, they may threaten the efficiency of the relevant market when a monopsony is able to manipulate the market by depressing producers' prices and increasing resale prices.[11] Hence, to demonstrate that a monopsonist has engaged in "unfair practices" under § 202(a), a seller must show that the buyer's practices threaten to injure competition by arbitrarily decreasing prices paid to sellers with the likely effect of increasing resale prices.

After reviewing the record in the case before us, we find that a genuine issue of material fact exists as to whether OK engaged in unfair practices in violation of § 202(a). In particular, we note that the record contains evidence of the classic monopsony injury, namely that OK is depressing the prices it pays the Growers and reselling at inflated prices. If OK does not compete with other buyers and completely controls the supply to its growers, it may be able to manipulate prices by controlling supply and demand. The record contains expert testimony identifying specific practices that are likely to injure competition in this way. For example, when wholesale prices are weak, OK delays delivery of chicks to growers,

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[11] Although this case does not involve horizontal price-fixing by a group of buyers, OK's alleged practices manipulate the market in a similar fashion: "[M]arket manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone." *United States v. Socony- Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (explaining price-fixing as a form of market manipulation). Like illegal price-fixing agreements, a monopsonist's use of supply contracts to manipulate the market poses the risk that prices will be determined by artificial, rather than market, forces.

thereby decreasing the production of broilers by growers and causing prices to rise on the wholesale market (which eventually adversely affects consumers). Growers are also adversely affected because they produce (and therefore sell) fewer chickens. Furthermore, the record contains evidence that the Growers are paid the same under OK's pricing system during periods of reduced production as they are during periods of average and above average production. In other words, OK can decide to reduce production (to reap the benefits of higher prices on the wholesale market), but it does not have to pay its growers the higher prices that a reduction in supply would demand in a competitive market.

We are not suggesting that uncompetitive prices alone are unlawful. Courts have routinely noted that, short of predatory pricing, a monopolist's uncompetitive prices do not violate antitrust laws. *See, e.g., Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 927 (1st Cir. 1984) ("Ordinarily . . . even a monopolist is free to exploit whatever market power it may possess when that exploitation takes the form of charging uncompetitive prices."). [12] But if a monopsonist's uncompetitive prices are a result not solely of

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[12] In acknowledging that an insurer could use its market power to "keep prices down," the court in *Kartell* noted that the lower prices the insurer paid doctors for their services did not result in higher consumer prices, 749 F.2d at 930-31, and that both parties "sit on opposite sides of the bargaining table," *id.* at 929 (quotation omitted). We are confronted with a potentially different arrangement in the case before us. The record contains evidence that OK's practices are likely to increase end-user prices. Moreover, the supply contracts with the Growers give OK complete control over the input market (i.e., the chickens available to OK for purchase), leaving the growers with little, if any, ability to bargain.

its market power, but also of practices that result in complete control of the input (supply) market, the effect of the monopsonist's practices may be an injury to competition. Moreover, although PSA claims against processors for practices associated with supply contracts have not enjoyed much success, these cases are factually different from the one before us. *See Pickett*, 420 F.3d 1272; *IBP, Inc.*, 187 F.3d 974. For example, the producers in these cases did not allege the existence of a monopsony. In addition, the supply contracts guaranteed producers a price tied to market prices, and overall, the arrangements created incentives and efficiencies that benefitted consumers. *Pickett*, 420 F.3d at 1284 ("[I]t was undisputed . . . that marketing agreements are a more efficient means for both meat packers and cattle producers to operate in the market."); *IBP, Inc.*, 187 F.3d at 978 (explaining that the marketing agreements "essentially ensure[] that the potential for undue or arbitrary lowering of prices is eliminated"); *see also Griffin v. Smithfield Foods, Inc.*, 183 F. Supp. 2d 824, 827 (E.D. Va. 2002) (granting summary judgment in favor of a defendant packer because the plaintiff producers had not identified any specific practices that violated the PSA).

We therefore conclude that, if the Growers prove that OK engaged in the arbitrary price manipulation described above with the effect or likely effect of depressing prices to the growers and reselling at increased prices, they may establish that OK engaged in unfair practices in violation of § 202(a). We are by no means suggesting that vertically integrated markets will always violate the PSA. Rather, we hold that § 202(a) is violated when a monopsonist engages in specific practices that result in or are likely to result in the anticompetitive effects the PSA was

designed to prevent. To prove a violation, the Growers may not rely on the sum total of various practices that individually are not likely to injure competition, but must instead prove that specific practices have caused or are likely to cause injury. *Capitol Packing Co.*, 350 F.2d at 76-77 ("[S]pecified methods of dealing which are not themselves violations of the [PSA] cannot, when added together, become a violation."). Because the record contains evidence that OK may engage in specific practices that are likely to injure competition, we reverse the District Court's grant of summary judgment in favor of OK and remand for further consideration in light of this opinion.

4. Discovery Ruling

Following the District Court's adverse ruling on their PSA claim, the Growers moved the court to reopen discovery for the limited purpose of discovering information regarding the likelihood of an injury to competition. The District Court denied the motion. The Growers argue that, because of the first judge's ruling that such proof is not required and because discovery had closed in the interim, the District Court erred in refusing to reopen discovery.

We review a district court's denial of a motion to reopen discovery for an abuse of discretion. *SIL-FLO, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1514 (10th Cir. 1990). "Under this standard, a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.* (quotation omitted).

When OK moved for summary judgment on the Growers' PSA claim, it explicitly re-raised the issue

in dispute.[13] The Growers therefore had fair warning that the issue was back on the table for resolution. In fact, they addressed the argument in their response to OK's motion. They argued that the law of the case bound the court to the prior ruling, but that in any event they had presented sufficient evidence of an injury to competition to withstand summary judgment. Only when the District Court disagreed with both propositions did the Growers seek to reopen discovery, arguing that they did not have an opportunity to discover the relevant information.

"[T]he Supreme Court has held that, under Fed. R. Civ. P. 56(f), 'summary judgment [should] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition.'" *Dreiling v. Peugeot Motors of Am., Inc.*, 850 F.2d 1373, 1376 (10th Cir. 1988) (alteration in original) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)). Rule 56(f)'s protection is not absolute, however, as its protection "arises only if the nonmoving party files an affidavit explaining why he or she cannot present facts to oppose the motion." *Id.* To benefit from the rule, a party "at a minimum must ask the court to refrain from acting on the summary judgment request until additional discovery can be conducted." *C.B. Trucking, Inc. v. Waste Mgmt., Inc.*, 137 F.3d 41, 44 (1st Cir. 1998); *see*

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[13] At this juncture, we would like to note that both parties flouted their duty under this Circuit's rules to include in the record the relevant motion for summary judgment, supporting brief, and response. *See* 10th Cir. R. 10.3(D)(2). Though we are not required to do so, we have obtained copies of the documents. But we advise that in the future the parties diligently adhere to the rules of the Circuit if they wish to avoid unwittingly waiving arguments.

also Allen v. Sybase, Inc., 468 F.3d 642, 662 (10th Cir. 2006) (concluding that a party's "footnote request in its [response] brief for additional discovery time does not pass muster under rule 56(f)"). "[A] party ordinarily may not attempt to meet a summary judgment challenge head-on but fall back on Rule 56(f) if its first effort is unsuccessful." *C.B. Trucking, Inc.*, 137 F.3d at 44. The Growers, with full knowledge that the District Court would be re-evaluating the competitive injury requirement under § 202(a), took no steps to request time for additional discovery; nor did they take steps to fulfill the requirements of Rule 56(f). In such a case, we are not left with a "definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *SIL-FLO, Inc.*, 917 F.2d at 1514 (10th Cir. 1990). We note, however, that on remand the parties may seek to reopen discovery, and the District Court may, in its discretion, grant such requests.

B. The Growers' Unconscionability Claim

The Growers claim that the broiler contract is unconscionable because of the gross imbalance of obligation borne by growers. For example, they point to the fact that the contract guarantees only a single flock of chicks although a grower must raise broilers for at least fifteen years to recoup its investment. They also note that OK is not obligated to place a minimum number of chicks or flocks with each grower, and growers are obligated to make improvements to chicken houses before OK will place additional flocks with them.

We must first address a threshold choice-of-law question. Beginning in 1997, OK's broiler contracts included a choice-of-law provision, designating the

law of Arkansas as the governing law. Consequently, in its order granting summary judgment, the District Court held that Oklahoma law governed the pre-1997 contracts and Arkansas law governed the contracts entered into thereafter.

To decide the effect of the contractual choice-of-law clause, we look to the forum state's choice-of-law rules. *See Dang v. UNUM Life Ins. Co. of Am.*, 175 F.3d 1186, 1190 (10th Cir. 1999) ("A federal court adjudicating state law claims must apply the forum state's choice of law principles."). Under Oklahoma law, "a contract will be governed by the laws of the state where the contract was entered into unless otherwise agreed and unless contrary to the law or public policy of the state where enforcement of the contract is sought." *Williams v. Shearson Lehman Bros., Inc.*, 917 P.2d 998, 1002 (Okla. Civ. App. 1995). Because we conclude that the Growers' unconscionability claim fails under both Oklahoma and Arkansas law, we need not decide whether the application of Arkansas law would be contrary to Oklahoma's law or public policy. In reaching this decision, we review the District Court's interpretation of state law de novo. *Steiner Corp. v. Johnson & Higgins of Cal.*, 135 F.3d 684, 690 (10th Cir. 1998) (citing *Salve Regina College v. Russell*, 499 U.S. 225 (1991)).

As an initial matter, the Oklahoma Supreme Court has never addressed whether Oklahoma common law would recognize an affirmative cause of action seeking damages for unconscionability in contract. Nevertheless, Oklahoma's unconscionability standard is so onerous that the Growers cannot meet that standard here. An unconscionable contract is one in which, "at the time of making of the contract, and in light of the general commercial background and

commercial needs of a particular case, clauses are so one-sided as to oppress or unfairly surprise one of the parties." *Barnes v. Helfenbein*, 548 P.2d 1014, 1020 (Okla. 1976). "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties, together with contractual terms which are unreasonably favorable to the other party." *Id.*

Whether the Growers lacked any meaningful choice is determined by "'all the circumstances surrounding the transaction.'" *Id.* at 1020 n.12 (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449-50 (D.C. Cir. 1965)). Relevant factors include whether the aggrieved party had a reasonable opportunity to understand the terms of the contract and whether the important terms were hidden "in a maze of fine print" or were "minimized by deceptive sales practices." *Id.* (quotation omitted). Generally, "one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain." *Id.* (quotation omitted). On the other hand, if there is a gross inequality of bargaining power and the aggrieved party signs a "commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms." *Id.* (quotation omitted).

Similar principles apply in Arkansas. In assessing whether a contract or a particular provision is unconscionable, the court must "review the totality of the circumstances surrounding the negotiation and execution of the contract," taking into consideration "whether there is a gross inequality of bargaining power between the parties and whether the aggrieved party was made aware of and comprehended the pro-

vision in question." *Jordan*, 207 S.W.3d at 535. Importantly, however, "it is [generally] not the province of the courts to scrutinize all contracts with a paternalistic attitude and summarily conclude that they are partially or totally unenforceable merely because an aggrieved party believes that the contract has subsequently proved to be unfair or less beneficial than anticipated." *Assoc. Press v. S. Ark. Radio Co.*, 809 S.W.2d 695, 697 (Ark. Ct. App. 1991) (quotation and alteration omitted). Indeed, in Arkansas, "parties are free to make contracts based on whatever terms and conditions they agree upon, provided it is not illegal or tainted with some infirmity such as fraud, overreaching, or the like." *Hancock v. Tri-State Ins. Co.*, 858 S.W.2d 152, 154 (Ark. Ct. App. 1993) (en banc).

None of these circumstances are present here. Although the District Court recognized the potential for some inequality of bargaining power, it was not a "gross inequality of bargaining power." The court noted that the availability of the broiler contracts is well-known in the region and has produced a waiting list of people who wish to become growers under the contract-a contract which is available for review prior to engaging in the capital investment needed to become a grower.

The Growers argue that the inequality of bargaining power should not be determined by reference to the availability of contracts and the fact that many people want to become a grower for OK. Rather, they suggest that the court consider whether they lacked any meaningful choice as to the terms of the contract and whether they had an alternative source for obtaining the desired service or product. Although Arkansas case law does suggest that these are relevant considerations, *see Nat'l Union Fire Ins. Co. of*

Pittsburgh v. Guardtronic, Inc., 64 S.W.3d 779, 783-84 (Ark. Ct. App. 2002), the Growers are incorrect in dismissing the fact that they initiated the contracting process with OK (i.e., OK did not solicit their business) as irrelevant to the analysis.

In *Jordan*, the plaintiff was a landscaper who rented large equipment from the defendant. 207 S.W.3d at 528. The rental agreement contained a boilerplate provision excusing the defendant from liability for the consequences of its own negligence in connection with the rental of the equipment. *Id.* at 531-32. After the plaintiff was injured by the equipment, he sued, arguing that the exculpatory clause was unconscionable and therefore unenforceable. The Arkansas Supreme Court disagreed. The court found no evidence of a "gross inequality of bargaining power" when the plaintiff "sought out the services" of the defendant and "paid for the rental equipment after being shown how to operate it." *Id.* at 536; *see also Barnes*, 548 P.2d at 1021 (applying Oklahoma law, court held that defendant did not behave unconscionably when the plaintiff's representative sought out the defendant to enter into a contract).

Furthermore, the Growers do not suggest that they are unsophisticated parties unable to evaluate the risks of the contract prior to entering into it. And they do not suggest that they failed to read and understand the terms of the contract prior to entering into it or even prior to building the chicken houses. Also worthy of note is that some of the named plaintiffs have been operating under this allegedly "unconscionable" contract for nearly twenty years. Generally, "[t]he fairness or unfairness, folly or wisdom, or inequality of contracts are questions exclusively within the rights of the parties to adjust

at the time the contract is made." *Id.* We therefore affirm the District Court's grant of summary judgment in favor of OK on the Growers' unconscionability claim.

III. CONCLUSION

Section 202(a) of the Packers and Stockyards Act requires a plaintiff who claims that a defendant's conduct was "unfair" to show that such conduct results in or is likely to result in an injury to competition. Because the record contains evidence that raises a genuine issue of material fact concerning the Growers' § 202(a) claim, we REVERSE the District Court's order granting OK summary judgment on this claim and REMAND for further proceedings consistent with this opinion. The Growers have, however, failed to show that the contracts at issue are unconscionable under state law. Accordingly, we AFFIRM the decision of the District Court granting summary judgment in OK's favor on the Growers' unconscionability claim. In addition, we AFFIRM the District Court's denial of the Growers' motion to reopen discovery, but do so without prejudice to subsequent requests to reopen discovery on remand. We also deny the Growers' motion to file a second supplemental appendix because the document they seek to add was not part of the record before the District Court.

05-7079, *Been v. O.K. Industries, Inc.*

HARTZ, *Circuit Judge*, concurring/dissenting

I join Chief Judge Tacha's thorough and scholarly opinion for the panel except for Part II.A.2, entitled "Interpretation of 'Unfair Practices' under § 202(a)" and Part II.A.3, entitled, "OK's Alleged Violations of § 202(a)." I arrive at almost the same destination

regarding statutory interpretation, but through a rather different route. In my view a practice may be "unfair" under § 202(a) of the Packers and Stockyards Act (PSA) even though it causes no competitive injury. In interpreting that provision we owe respect to the longstanding view of the United States Department of Agriculture (USDA), although I would reach the same interpretation even without reference to that view. On the other hand, the majority opinion's conception of competitive injury, which I do not share, appears to be broad enough that many, perhaps all, of the practices that could properly be labeled *unfair* would satisfy its competitive-injury requirement. Finally, I would affirm the district court's decision that the Growers failed to provide evidence showing that the practices challenged on appeal were unfair.

I. DEFERENCE TO THE USDA

The deference issue in this case is a very interesting one. The majority opinion appears to acknowledge that we would need to grant *Chevron* deference to the USDA's interpretation of PSA § 202(a), 7 U.S.C. § 192(a), if the USDA had "authority to adjudicate alleged violations of § 202 by live poultry dealers." Op. at 13. *See Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (court should defer in certain circumstances to agency's reasonable interpretation of ambiguous statutory language). Certainly such deference would appear to be required by the Supreme Court's gloss on *Chevron in United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001):

> [A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules

> carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

As the majority opinion correctly notes, the USDA does not have adjudicatory authority over § 202(a) violations by live-poultry dealers. The USDA does, however, have authority to adjudicate § 202(a) violations by packers. *See* 7 U.S.C. § 193. Most of the judicial decisions cited by the majority opinion involved packers, *see, e.g., Armour & Co. v. United States*, 402 F.2d 712 (7th Cir. 1968); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999), so we have the peculiar situation of not granting *Chevron* deference to the USDA in this case but relying on cases in which *Chevron* deference would have been proper.

I confess to having no idea how the Supreme Court would resolve this conundrum. Perhaps it would avoid the issue as I do, by agreeing with the USDA's interpretation. But at the least I would think that we owe respect to the experience and expertise of the USDA regarding the PSA. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944). In that regard it is worth noting that 26 years ago a treatise could report that the USDA "has consistently taken the position that in order to prove that a practice violates the broad prohibitions in §§ 202(a) and (b) . . . of the [PSA], it is not necessary to prove predatory intent, competitive injury, or likelihood of injury." 1 John H. Davidson et al., Agricultural Law § 3.47, at 244

(1981). Such a longstanding view of an agency is entitled to more respect than an ad hoc litigating position. *Cf. INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." (internal quotation marks omitted)).

In any event, even if the USDA had never addressed the matter, I would interpret the term *unfair practices* as not requiring competitive injury. I am persuaded by the Supreme Court's interpretation of the term unfair practices in the Federal Trade Commission Act (FTCA), the relationship between the PSA and that Act, and an early Supreme Court decision explaining the purpose of the PSA.

In *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), the Supreme Court construed § 5(a)(6) of the FTCA, 15 U.S.C. § 45(a)(6), which stated in pertinent part:

> The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

(amended and now recodified as 15 U.S.C. § 45(a)(2)). The Federal Trade Commission (FTC) had held that Sperry & Hutchinson (S&H) had violated the FTCA by attempting "to suppress the operation of trading stamp exchanges and other 'free and open' redemption of stamps." *Sperry & Hutchinson*, 405 U.S. at 234. S&H challenged the resulting cease-and-desist order, and the Fifth Circuit agreed, holding that the FTC could halt only conduct that "violated either the letter

or the spirit of the antitrust laws." *Id.* at 235. Before the Supreme Court the FTC did not dispute that S&H's conduct violated neither the letter nor spirit of the antitrust laws; rather, it contended that its authority was not limited to such conduct. *Id.* at 239. The Court held that the FTCA "empower[s] the [FTC] to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition." *Id.*

The prior history of the Court's interpretations of § 5(a)(6) and *Sperry & Hutchinson's* comments on that history have, as we shall see, particular implications for interpreting the PSA. The original version of the FTCA, enacted in 1914, did not include the language empowering the FTC to prevent "unfair or deceptive acts or practices in commerce"; the Act provided power only to prevent "unfair methods *of competition in commerce*." Federal Trade Commission Act, Pub. L. No. 63-203, § 5, 38 Stat. 717, 719 (1914) (emphasis added). In 1920 (the year before enactment of the PSA) the Supreme Court, over the dissent of Justice Brandeis, one of the FTCA's drafters, adopted a limiting interpretation of "unfair methods of competition," restricting the covered practices to those "heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." *FTC v. Grata*, 253 U.S. 421, 427 (1920); *see Sperry & Hutchinson*, 405 U.S. at 241. Later, in *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 649 (1931), the Court made clear that an unfair method must be unfair to competitors. It said:

> [T]he word 'competition' imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors—that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be, lessened or otherwise injured.

Three years later, however, the Supreme Court changed course in *Federal Trade Commission v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304 (1934). As explained in *Sperry & Hutchinson*, 405 U.S. at 242-43, the Court in Keppel upheld an FTC cease-and-desist order against a candy marketing scheme on the ground that it "contravened public policy insofar as it tempted children to gamble and compelled those who would successfully compete with Keppel to abandon their scruples by similarly tempting children." The marketing scheme "was 'unfair,' though any competitor could maintain his position simply by adopting the challenged practice." *Id.* at 243. *Sperry & Hutchinson* concluded its summary of *Keppel* as follows: "Thenceforth, unfair competitive practices were not limited to those likely to have anticompetitive consequences after the manner of the antitrust law; nor were unfair practices in commerce confined to purely competitive behavior." *Id.* at 244. The Court then noted that the *Keppel* decision's "perspective" of the FTCA "was legislatively confirmed" in 1938 when Congress amended the Act by adding the phrase "unfair or deceptive acts or practices" to the original ban on "unfair methods of competition." *Id.* at 244 (internal quotation marks omitted). The Court thought that the language *unfair or deceptive acts or practices* clearly did not require anticompetitive conduct. *See id.*

To return to the PSA, the original 1921 language of § 202(a) made it unlawful to "Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce." Pub. L. No. 67-51, § 202, 42 Stat. 161. The language "unfair . . . practice . . . in commerce" is the very language construed by *Sperry & Hutchinson* as not requiring an "effect on competition." 405 U.S. at 239. Moreover, the language is part of the same language in the 1938 amendments to the FTCA that *Sperry & Hutchinson* described as "confirm[ing]" the *Keppel* view that unfair practices under the FTCA were not "confined to purely competitive behavior." *Id.* at 244.

Particularly noteworthy is that the language of PSA § 202(a) more clearly omits a competitive-effect requirement than does the FTCA language construed in *Keppel.* Section 202(a) does not include the phrase "restraining commerce" that appears in other subsections of § 202. See § 202(c) ("if such apportionment has the tendency or effect of restraining commerce"); § 202(d) (transferring or reviewing an article "for the purpose or with the effect of . . . restraining commerce"); § 202(e) (doing "any act for the purpose or with the effect of . . . restraining commerce"). And perhaps more striking, § 202(a) does not use the FTCA's language "unfair methods of competition" construed in *Keppel.* Perhaps this failure to adopt the language of the FTCA, enacted seven years earlier, was to avoid the narrow construction of the FTCA by the Supreme Court in *Grata*, decided shortly before enactment of the PSA.

Comparison of the PSA to the FTCA is sensible because the PSA is an offspring of the FTCA. In 1917 President Wilson ordered an FTC investigation of the food industry. *See* Davidson *et al.*, *supra*, § 3.02, at

187. The FTC's report condemned the practices of the meat-packing industry. *See id.* The five largest packers entered into a consent decree under the Sherman Act in 1920, but the PSA was enacted in 1921, presumably because the antitrust laws and the FTCA were deemed inadequate to the task of dealing with the problem. *See id.* At 187-88. In that light it would be somewhat surprising if "unfair practices" under the PSA had a narrower meaning than "unfair methods of competition" in the FTCA.

Supporting this view is the discussion of the recently enacted PSA in *Stafford v. Wallace*, 258 U.S. 495 (1922), which upheld the PSA's constitutionality. Some courts have relied on the Supreme Court's statement in that opinion that "[t]he chief evil feared is the monopoly of the packers." *Id.* at 514. But the purpose of the PSA was not just to end the packers' monopoly. The 1920 consent decree should have accomplished that task. The PSA's purpose was to end the sort of practices engaged in by the monopoly, practices that could certainly be characterized as unfair but could not easily be characterized as restricting competition. This point is made clear by quoting at length from Chief Justice Taft's opinion for the Court:

> The object to be secured by the act is the free and unburdened flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still, as live stock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.

The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer, who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil which it sought to provide against by the act, was exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of the live stock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers on the other. Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce. The shipper, whose live stock are being cared for and sold in the stockyards market is ordinarily not present at the sale, but is far away in the West. He is wholly dependent on the commission men. The packers and their agents and the dealers who are the buyers, are at the elbow of the commission men, and their relations are constant and close. The control that the packers have had in the stockyards by reason of ownership and constant use, the relation of landlord and tenant between the stockyards owner, on the one hand, and the commission men and the dealers on the other, the power of assignment of pens and other

> facilities by that owner to commission men and dealers, all create a situation full of opportunity and temptation to the prejudice of the absent shipper and owner in the neglect of the live stock, in the *mala fides* of the sale, in the exorbitant prices obtained, in the unreasonableness of the charges for services rendered.

The scope of the PSA is further reflected in the accompanying House Report, which states:

> A careful study of the bill, will, I am sure, convince one that it, and existing laws, give the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards and all activities connected therewith; that it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.

H.R. Rep. No. 67-77, at 2 (1924).

It appears to me that the condemned practices described by Chief Justice Taft are of the same ilk as those that the majority opinion holds are covered by the PSA. Where I differ from the majority opinion in this regard is that I would not describe the injuries caused by those practices as competitive injuries. The majority opinion does not explain how the alleged practices hurt OK's competitors or even how they injure competition among the Growers. The alleged injuries may be caused by the existence of a monopoly. But it is unclear to me how the practices (such as unilaterally decreasing production by delivering fewer chicks to growers) reduce competition among either growers or dealers. If competitive injury were

required by § 202(a), I would agree with the district court that the Growers had not presented sufficient evidence of such injury.

Turning to the specific allegations of this case, I depart from the majority opinion in that I would affirm the decision below because the Growers have not presented sufficient evidence to support their claims that the practices at issue on appeal are unfair. My reasons are essentially the same as the majority opinion's reasons for rejecting the Growers' unconscionability claims. The Growers are not existing producers who sought a market for their product and were confronted with OK's take-it-or-leave-it contracts. Rather, they entered into their businesses only after approaching OK and seeking approval to become its suppliers. The terms of the contract were known. The Growers made an informed decision to enter the industry. To the extent that the Growers claim that the contract misrepresents OK's actual practice, those are deceptive-practice claims; and it is my understanding that such claims are not before us. Perhaps OK's exercise of its authority under the contract to reduce the number of birds placed with the Growers could be an unfair practice if it were the result of an effort by OK to drive up prices for its products. But the Growers' briefs on appeal do not allege that any reduction in placement has occurred.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. CIV-02-285-RAW

CHARLES BEEN, *et al.*,
Plaintiffs,

v.

O.K. INDUSTRIES, INC., *et al.*,
Defendants.

ORDER

Before the court is the motion of the defendants[1] for judgment as a matter of law (JMOL). On March 10, 2008, the jury returned a verdict in favor of the plaintiffs in the amount of $21,141,975.00 (#533). On March 25, 2008, the court entered judgment in favor of plaintiffs in accordance with that verdict (#543)[2].

In considering the present motion, the court must construe the evidence and inferences most favorably to the nonmoving party, and refuse to weigh the evidence, pass on the credibility of the witnesses, or substitute this court's conclusions for those of the jury. *Harsco Corp. v. Renner*, 475 F.3d 1179, 1185-86

[1] The defendants are O.K. Industries, Inc., O.K. Foods, Inc., O.K. Farms, Inc., and O.K. Broiler Farms Limited Partnership (hereinafter "O.K.").

[2] The trial involved alleged violation of §202(a) of the Packers and Stockyards Act ("PSA"). *See generally Been v. O.K. Industries, Inc.*, 495 F.3d 1217 (10th Cir.2007).

(10th Cir.2007). The court must enter judgment as a matter of law in favor of the moving party if there is no legally sufficient evidentiary basis with respect to a claim or defense under the controlling law. *Id.* at 1186. *See also Guides, Ltd. v. Yarmouth Group*, 295 F.3d 1065, 1073 (10th Cir.2002).

Defendants raise seven grounds in their motion. First, they contend there is no substantial evidence that O.K. is a monopsonist in any relevant regional market. The argument is that, inasmuch as O.K. purchases grower services in both Oklahoma and Arkansas, any discussion of the relevant geographical market must look at both states. Defendants assert that in Scott County, Arkansas, they compete with Tyson and with Wayne Farms.

In response, plaintiffs first contend that defendants did not preserve this contention because it was not articulated in its Rule 50 motion at trial. A party may not circumvent Rule 50(a) by raising for the first time in a post-trial motion issues not raised in an earlier motion for directed verdict. *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1228 (10th Cir.2000). A JMOL motion made at the close of the evidence preserves for review only those grounds specified at the time, and no others. *Vanderhurst v. Colorado Mountain College Dist.*, 208 F.3d 908, 915 (10th Cir.2000). On the other hand, such a motion is liberally construed and technical precision is not the standard. *Cummings v. Gen. Motors Corp.*, 365 F.3d 944, 949 (10th Cir.2004).

Plaintiffs appear to be correct in their assertion[3], but for the sake of thoroughness, the court will

[3] In their reply brief, defendants do not address the preservation issue.

address defendants' argument on the merits. The court agrees with plaintiffs that the argument fails because (1) the PSA does not appear to mandate a market definition requirement identical to that in antitrust actions and (2) the relevant geographical market is the area to which the growers could turn for alternative *purchasers* of their services, rather than where O.K. could turn for alternative *sellers* of such services. The Tenth Circuit holds that "a monopsony may exist when sellers are unable to find alternative buyers and must sell to a single purchaser." *Been*, 495 F.3d at 1232. The motion is denied on this ground.

Second, O.K. asserts that plaintiffs produced no evidence that O.K. had unilaterally and arbitrarily reduced grower pay or production. Again, plaintiffs contend this issue was not preserved by defendants' motion at trial. The court makes the same ruling as previously, and will address the merits. The testimony of Dr. Taylor, the court holds, was sufficient to support a jury's finding on this point under the standard applicable to a JMOL motion.

Third, defendants argue there was no evidence that O.K.'s production decisions were arbitrary or that they in fact reduced production. Noting the effects of the Russian embargo about which evidence was introduced, defendants state that a reduction in production in response to decreased demand is not arbitrary, but rather is economically efficient behavior. Again, the court finds that Dr. Taylor's testimony was sufficient to support a jury finding of arbitrariness under the court's instructions.

The next two issues will be addressed together. Fourth, O.K. contends that plaintiffs failed to show that O.K. exercised market power in any output

market. Fifth, O.K. contends there was no evidence that O.K.'s production decisions had any likely impact on the prices paid by consumers. The argument is that defendants' miniscule market share in the output market did not command sufficient supply to increase prices to consumers. Plaintiffs in response point to the pertinent jury instruction given by the court which states in part: "You are specifically instructed that whether or not defendants have market power in the output market is not part of the plaintiffs' burden of proof." Plaintiffs correctly note that defendants did not object to the instruction in question. Plaintiff continue that therefore review is only for plain error [4]. The court is persuaded that no error was committed on this point. The Been opinion contains language simply presuming consumer harm: "According to economists, without competition from other buyers, a monopsonist will lower prices paid to sellers, which over time results in higher consumer prices." 495 F.3d at 1232 (footnote omitted)[5]. Clearly, the Tenth Circuit did not place the burden on plaintiffs to demonstrate defendants' market share in the output market. This court permitted defendants to present such evidence as a defense, but the jury manifestly rejected that defense. Additionally, testimony of Dr. Taylor was sufficient for a pertinent jury finding under the JMOL standard. The motion will not be granted on these grounds either.

Sixth, the defendants aver that plaintiffs failed to prove that O.K. committed an unfair act "with

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[4] In any event, an erroneous jury instruction would prompt a new trial, not the granting of a JMOL.

[5] This issue, a vexed question in the case at bar, is given an interesting discussion in Laura Alexander, Note, *Monopsony and the Consumer Harm Standard*, 95 Geo. L.J. 1611 (2007).

respect to live poultry" that injured competition. Defendants focus on the quoted phrase, which appears in Section 202(a) of the PSA, to argue that the scope of the law is confined to issues arising from existing poultry, and thus does not cover reduced *production* of chickens. The court agrees with plaintiffs that this ingenious argument has apparently been foreclosed by the passage in *Been* which appears to contemplate decreased production constituting a possible claim under Section 202(a). *See Been*, 495 F.3d at 1233-34.

Seventh, defendants assert that the statute of limitations bars the claim of each class representative. The court disagrees, for reasons addressed in the order ruling on the defendants' motion for new trial. In any event, even if defendants were correct, this would not justify granting judgment in their favor. The fact that a named class representative's claims are time barred does not necessarily effect the viability of the class action. *Davis v. Bethlehem Steel Corp.*, 600 F.Supp. 1312, 1323 (D.Md.1985). A proper plaintiff may be substituted to represent the class. *Id.*

The court concludes with a brief editorial. The court previously granted defendants' motion for summary judgment, a decision reversed by the Tenth Circuit. A terse summary of this court's view is that "like all antitrust cases, this one must make economic sense." *United States v. Syufy Enters.*, 903 F.2d 659, 663 (9th Cir.1990)[6]. A PSA case is not an antitrust case, but Section 202 of the PSA incorporates the basic antitrust blueprint. Been., 495 F.3d at 1228. Even now, this court is uncertain how this case

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[6] Judge Posner takes this statement as an epigraph to the "Introduction" of his *Antitrust Law*, (2d ed.) (U.Chi.Press 2001).

makes economic sense, in part for some of the reasons articulated by defendants in the present motion and elsewhere. Plaintiffs have complained throughout this litigation that they are "at the mercy" of Defendants because the growers have each individually invested hundreds of thousands of dollars in their chicken growing facilities, but the Defendants may stop providing them chicks at any time, thus resulting in their economic ruin. Although Plaintiffs admit this litany of horribles has never occurred, they now may find themselves in the ironic position where their money judgment itself may cause O.K.'s insolvency, thus leaving them with no buyer for their chickens. In any event, it is abundantly clear that under governing authority, defendants are not entitled to judgment as a matter of law.

It is the Order of the Court that the motion of the defendants for judgment as a matter of law (#545) is hereby DENIED.

ORDERED THIS 3rd DAY OF JULY, 2008.

Dated this 3rd Day of July 2008.

Ronald A. White
United States District
Eastern District of Oklahoma

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. CIV-02-285-RAW

CHARLES BEEN, *et al.*,
Plaintiffs,

v.

O.K. INDUSTRIES, INC., *et al.*,
Defendants.

ORDER

Before the court is the motion of the defendants[1] for new trial. On March 10, 2008, the jury returned a verdict in favor of the plaintiffs in the amount of $21,141,975.00 (#533). On March 25, 2008, the court entered judgment in favor of plaintiffs in accordance with that verdict (#543)[2].

The appropriate standard of review depends upon the ground asserted in the motion, and the present motion asserts multiple grounds. Whether to submit a general verdict form is committed to the trial court's discretion, and the district court is under no obligation to require the jury to return special verdicts or to answer special interrogatories. *See*

[1] The defendants are O.K. Industries, Inc., O.K. Foods, Inc., O.K. Farms, Inc., and O.K. Broiler Farms Limited Partnership (hereinafter "O.K.").

[2] The trial involved alleged violation of §202(a) of the Packers and Stockyards Act ("PSA"). *See generally Been v. O.K. Industries, Inc.*, 495 F.3d 1217 (10th Cir.2007).

Martinez v. Union Pac. R.R. Co., 714 F.2d 1028, 1032 (10th Cir. 1983). Evidentiary errors warrant a new trial only when a party's substantial rights are adversely and prejudicially affected. *See Sanjuan v. IBP, Inc.*, 160 F.3d 1291, 1297 (10th Cir.1998). Faulty jury instructions require reversal when (1) there is substantial doubt whether the instructions, considered as a whole, properly guided the jury in its deliberations; and (2) when a deficient jury instruction is prejudicial. *See McInnis v. Fairfield Communities, Inc.*, 458 F.3d 1129, 1141 (10th Cir.2006).

Finally, where a new trial motion asserts that the jury verdict is not supported by the evidence, the verdict must stand unless it is clearly, decidedly, or overwhelmingly against the weight of the evidence. *Anaeme v. Diagnostek, Inc.*, 164 F.3d 1275, 1284 (10th Cir.1999). This court must view the record evidence in the light most favorable to the prevailing party, while being mindful that the jury has the exclusive function of appraising credibility, determining the weight to be given to the testimony, drawing inferences from the facts established, resolving conflicts in the evidence, and reaching ultimate conclusions of fact. *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1226 (10th Cir.2000).

First, defendants object to the court's use of a general verdict as opposed to special interrogatories. This argument is coupled with contentions that the plaintiffs' evidence was inadequate (or, in Dr. Taylor's testimony, too amalgamated) on such matters as "density reduction," "information sharing," and "building specification control."[3] The court was persuaded

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[3] Plaintiffs argue that defendants waived any contention as to insufficiency of evidence by failing to articulate this specific

that the interrogatories posed a risk of jury confusion and that the general verdict was appropriate under the evidence presented. The motion is denied as to this ground.

Next, defendants assert that the court should have excluded Dr. Taylor's testimony. The court remains persuaded that the testimony was appropriate for the issues to be tried,[4] and that a new trial is not appropriate.

Finally, defendants attack certain of the court's jury instructions or lack thereof. The defendants did not object to several of these instructions, and in any event the court does not find the instructions erroneous. Deserving of some discussion is the court's decision *not* to instruct the jury as to statute of limitations. In some circumstances, factual issues related to a statute of limitations should be put before a jury. *Eagleston v. Guido*, 41 F.3d 865, 871 (2d Cir. 1994)[5]. The court is not persuaded the case at

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point in its Rule 50(a) motion at trial. The court will address the contention on the merits.

[4] This is not to say that the court found persuasive the testimony of either parties' expert witness. Admittedly not itself an expert in economics, the court found Defendants' expert's testimony to have a number of research gaps and found the Plaintiffs' expert's testimony to be little more than gussied up wealth redistributive theory of probable Marxist origin. Nevertheless, because the court believed these flaws went more to the credibility of the experts' testimony than to its admissibility, the jury was allowed to hear it.

[5] The statement does appear in a Tenth Circuit opinion that "[w]hether an action is timely is question for the jury to decide applying a preponderance of the evidence standard." *Aguinaga v. United Food & Com. Workers Intern.*, 993 F.2d 1463, 1472 (10th Cir. 1993). That case, however, involved factual issues as to the plaintiff's knowledge of his union's alleged violations. This

bar presents such circumstances. In the present case, the court concluded as a matter of law that the jury need not be instructed as to statute of limitations because of the applicability of the "continuing harm" doctrine and the "speculative damages" doctrine[6].

The court also rejects defendants' argument that evidence of Gene Blackwell's particular earnings should have been excluded as irrelevant. The court does not view the admission as error, and in any event it does not rise to the level that a new trial should be granted.

The court raises a final issue on its own motion. Defendants have not asked for remittitur in their JMOL or new trial motions, but the court believes it has the power to raise the issue sua sponte. *See Vadie v. Miss. State Univ.*, 218 F.3d 365, 378 (5th Cir.2000). In the usual remittitur situation, a trial judge reviews the jury's verdict in order to determine if substantial evidence at trial supported the amount awarded. If not, the court may then determine a reasonable amount as plaintiffs' damages and allow plaintiffs to remit the excess over the amount. *See generally Cartel Asset Management v. Ocwen Fin. Corp.*, 2007 WL 2733725 (10th Cir.). The court finds that the jury's damage award was not supported by substantial evidence and should be reduced.

Plaintiffs, however, must be given the option of a new trial in lieu of remitting a portion of the jury's

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court concludes that the statement cannot have been intended literally in every case.

[6] The court's conclusion in this regard was not formally entered on the record because defendants did not make a formal specific objection to the absence of a statute of limitation instruction.

award. If the plaintiffs do not consent to the remittitur, the district court has no alternative but to order a new trial on damages. Id. Here, the court finds the absolute maximum supported by the evidence was $14,511,935 as stated in the instructions at page 5[7].

It is the Order of the Court that the motion of the defendants for new trial (#550) is hereby DENIED. The court, however, directs that the stay on execution of judgment remains in effect. The court suggests remittitur of the damages award to $14,511,935. Plaintiffs are given ten days from the date of this order to file a consent to remittitur, at which time an amended judgment will be entered. If plaintiffs do not consent to the remittitur, a new trial as to damages will be ordered.

ORDERED THIS 3rd DAY OF JULY, 2008.

Dated this 3rd Day of July 2008.

Ronald A. White
United States District
Eastern District of Oklahoma

[7] During deliberations, the jury sent the court a note inquiring if they were bound by the damages limitation set forth in the instructions. The court answered "no", not knowing if the jury was considering awarding a greater or *lesser* amount than the boundaries set forth in the instructions. This does not effect whether there was adequate evidence supporting the amount that was ultimately awarded.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. CIV-02-285-RAW

CHARLES BEEN, *et al.*,
Plaintiffs,

v.

O.K. INDUSTRIES, INC., *et al.*,
Defendants.

ORDER

Before the Court is the defendants' motion for summary judgment. The standard for summary judgment is set forth in Rule 56(c) F.R.Cv.P. In making this determination, the Court views the evidence and draws reasonable inferences therefrom in the light most favorable to the nonmoving party. *Simms v. Oklahoma*, 165 F.3d 1321, 1326 (10th Cir. 1999).

This Court previously granted summary judgment in defendants' favor on the class-wide claims that (1) the broiler contract is unconscionable and (2) the defendants violated §202(a) of the Packers and Stockyards Act ("PSA"), 7 U.S.C. §192(a). On appeal, the United States Court of Appeals for the Tenth Circuit affirmed as to the claim of unconscionability. The appellate court also agreed with this Court that the PSA provision requires a showing of competitive injury, but found the record contained evidence that

raised a genuine issue of material fact on this point. Accordingly, the case was remanded as to the PSA claim. *Been v. O.K. Indus., Inc.*, 495 F.3d 1217 (10th Cir.2007).

It is not outside this Court's authority to grant summary judgment after remand under certain circumstances. Defendants contend it is appropriate in this case because the Tenth Circuit had "no factual basis" for certain findings and was "ignorant of facts that have come to light after its decision[.]" This might be a stronger argument had the Tenth Circuit not stated "both parties flouted their duty under this Circuit's rules to include in the record the relevant motion for summary judgment, supporting brief, and responses." *Id.* at 1235 n.13. To the extent it could have been, a better record should have presented to the appellate court. Nevertheless, the Court has considered the motion on the merits.

The motion makes three arguments: (1) for summary judgment on the ground there is no evidence that defendants have ever *arbitrarily* taken actions with the intended or likely effect of raising prices in the output market; (2) for summary judgment on the ground that plaintiffs can present no evidence that defendants sell into any product or geographic market in which defendants can injure competition in the manner necessary to sustain a PSA claim; (3) for partial summary judgment on statute of limitation grounds as to 266 of the class members.

"Plaintiffs and Defendants fundamentally disagree concerning the meaning of the Circuit's opinion as it relates to monopsony and injury to competition." (Defendants' Trial Brief at 24). With all due respect to the appellate court, the parties are not at fault in this regard. At the first post-remand scheduling

conference on September 18, 2007, the Court described the opinion as "well-written." In one sense this is correct, but the opinion is also—to the Court's eye—less then pellucid on certain critical matters. This case will be tried to a jury and that pitiable group will need as much guidance as possible in the Court's instructions and in the proper admission or exclusion of evidence. If a proper interpretation of the Circuit's mandate is not confidently secured, the bone-chilling prospect of another reversal and a second trial looms.

The pertinent section of the PSA incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation. *Id.* at 1228. The wild card is that it was intended to be broader than antecedent antitrust legislation. *Id. See also id.* at 1231 ("Congress intended the PSA to have a broader scope than the antitrust laws."). Therefore, antitrust precedent may or may not be applicable[1].

Defendants argue that there is no evidence to support a finding that their actions in (a) reducing production, (b) reducing densities, and (c) using "time out periods" of 10-14 days instead of five, are arbitrary, or even that these actions have reduced production. This argument is a focus upon the Tenth Circuit's statement that plaintiffs must prove "arbitrary price manipulation" on the defendants' part. *Id.* at 1234. Defendants contend they only reduced production in a period encompassing portions of calendar

[1] For example, in previously granting summary judgment, this Court mentioned lack of entry barriers for competitors, having in mind that a "natural monopsony" does not usually come under antitrust purview. The Tenth Circuit held that such an antitrust requirement "does not apply in the context of the PSA." *Id.* at 1231.

years 2002-2003 and that this was in response to a Russian embargo on American chicken. Defendants state that its competitors did the same and "to cut losses is not an 'arbitrary' practice that violates the [PSA]."

Essentially, defendants are contending for some sort of "legitimate business justification" defense. Such a defense has been recognized in the antitrust law context. *See Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1550 (10th Cir.1995). In response, plaintiffs note the Tenth Circuit's statement that a showing of intent to cause the injury or other unlawful effect is not required. "Instead, the Growers need only prove that specific practices have the *effect* of injuring competition or are likely to do so." Been, 495 F.3d at 1231.

Plaintiffs appear to be correct, although the Court is not prepared to definitively rule at this time. The word "arbitrary" may be a term of art simply describing an act which has the effect of producing a deviation from the price that would occur in a competitive market. The parties have the same dispute over the word "manipulation", which is normally an intent-laden word, but arguably is not in this context[2]. In any event, the issue is sufficiently uncertain at this time that summary judgment will be denied. Whether defendants engaged in "arbitrary manipulation of prices" will be an issue for the jury initially[3]. Should the Court exclude all evidence of

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[2] *See id.* at 1233 n.11 (market manipulation described as artificial force on market prices).

[3] In *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272 (11th Cir.2005), the district court was affirmed after granting judgment as a matter of law on a PSA claim based upon a "legiti-

defendants' motivation in reducing production, the Court intends to advise the jury in preliminary instructions (1) *why* the jury is being presented with an evidentiary vacuum in this regard and (2) what is the special definition of "arbitrary" governing the case. Otherwise, the jury might form the opinion during the course of the trial that all defendants' actions were arbitrary (in the usual sense) because the jury is hearing no evidence explaining the conduct. It seems anomalous that a trial would be conducted about a business relationship from which all evidence of "business judgment" is excluded, but the Court is bound by the Tenth Circuit mandate. A definitive evidentiary ruling will be made prior to trial.

Next, defendants argue that there is no evidence that defendants hold market power in the output or downstream market (i.e., as a seller). The Tenth Circuit in antitrust cases has diminished end-user impact. *See Telecor Commc'ns, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1133-34 (10th Cir.2002) ("The Supreme Court's treatment of monopsony cases strongly suggests that suppliers . . . are protected by antitrust laws even when the anticompetitive activity does not harm end users."). The *Been* opinion cites this principle but repeatedly refers to consumer harm, whether actual or potential.

"In other words, a poultry processor with monopsony power can fix and manipulate prices resulting in injury to both poultry producers (i.e., growers) and

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mate business justification." *Id.* at 1280. The Tenth Circuit distinguished *Pickett* in the *Been* opinion, see 495 F.3d at 1233, but did so on the basis of the factual evidence adduced in the two cases, not imposition of "strict liability" under the PSA.

end-users (i.e., consumers)." *Been*, 495 F.3d at 1232. "[A monopsonist] may simply deliver fewer chicks to the growers, pay them the same low prices, and resell at the same or a higher price. When this happens, both the growers and the end-users are adversely affected. That is, by manipulating prices to suppliers, a monopsonist threatens to injure the end-users." *Id.* "[T]he plaintiff must show that the monopsonist's practices have caused or are likely to cause the anticompetitive effect associated with monopsonies, namely the arbitrary manipulation of market prices by unilaterally depressing seller prices on the input market with the effect (or likely effect) of increasing prices on the output market." *Id.* "Hence, to demonstrate that a monopsonist has engaged in 'unfair practices' under §202(a), a seller must show that the buyer's practices threaten to injure competition by arbitrarily decreasing prices paid to sellers with the likely effect of increasing resale prices." *Id.* at 1233. "We therefore conclude that, if the Growers prove that OK engaged in the arbitrary price manipulation described above with the effect or likely effect of depressing prices to the growers and reselling at increased prices, they may establish that OK engaged in unfair practices in violation of §202(a)." *Id.* at 1234[4].

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[4] One passage in the opinion could be read as stating that liability may be imposed on defendants simply for the effect of their activities on the growers: "But if a monopsonist's uncompetitive prices are a result not solely of its market power, but also of practices that result in complete control of the input (supply) market, the effect of the monopsonist's practices may be an injury to competition." *Id.* at 1234. This passage makes no reference to the output market, unless it is encompassed by the word "effect".

The passage quoted above appears to link with the following passage: "Moreover, the supply contracts with the Growers give

Plaintiffs contend that whether defendants' practices affect output price does not depend upon market power in the output market. According to the *Been* opinion, it is evidently a truism among economists that "without competition from other buyers, a monopsonist will lower prices paid to sellers, which over time results in higher consumer prices." *Id.* at 1232 (footnote omitted)[5]. The Tenth Circuit in *Telecor* set forth the causation chain: "Some producers will either produce less or cease production altogether, resulting in less-than-optimal output of the product or service, and over the long run higher consumer prices, reduced product quality, or substitution of less efficient alternate products." *Telecor*, 305 F.3d at 1136.

The Court must decide if this part of plaintiffs' burden is effectively taken away from the jury in lieu of an "automatic" presumption favored by economists. It seems to the Court (at this time) that the jury cannot appropriately be denied hearing evidence that the economic line of logic may not be irresistible under the particular facts of a case. For example, "[a]t the time of this lawsuit, OK had a waiting list of over 130 persons desiring to become growers for OK or to expand their existing operations." *Been*, 495 F.3d at 1222. Such a situation would appear to make

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OK complete control over the input market (i.e., the chickens available to OK for purchase), leaving the growers with little, if any, ability to bargain." *Id.* at 1234 n.12. That very footnote, however, also observes "[t]he record contains evidence that OK's practices are likely to increase end-user prices." *Id.*

[5] The truism or presumption applying "over time" is interesting, in that a trial is not designed to deal with an unlimited time horizon. Defendants protest: "Must O.K. pay for so remote a happening, one that might venture beyond the limits of Earthly time?" (#461 at 20). The Court appreciates the quasi-biblical tone, but must try to apply the Tenth Circuit's mandate as best it can.

it less likely that producers are going to produce less or cease production. Similarly, the defendants' market power in the output market is arguably relevant to the plaintiffs' burden as articulated in the *Been* opinion. This is not to say that plaintiffs are required to introduce evidence of market power as part of their case. They may seek to meet their burden of proof as they see fit. If defendants, however, seek to introduce evidence of their market power in the downstream market as proof that their conduct is *not* likely to increase consumer prices, this may well be permitted. As with many issues in this case, the Court is continuing to ponder, and will announce a definitive ruling as soon before the trial as possible. The Court can be definitive that defendants' motion for summary judgment is denied on this ground.

Finally, defendants seek summary judgment on statute of limitation grounds as to 266 of the class members. Defendants contend that the appropriate statute of limitation is four years, citing an Eighth Circuit case. Further, that the claim accrues when the plaintiff enters the contract, which is thus the time of injury. Accordingly, the argument concludes, any plaintiff who entered into his contract before May 29, 1997 is time-barred. Plaintiffs respond (in conjunction with other arguments) that the motion fails outright because defendants have not presented evidence as to when the 266 plaintiffs in question entered into their contracts. Plaintiffs' assertion is correct and the motion is denied.

The parties have not addressed how they wish this issue to be presented to the jury. If there are factual issues for the jury to be addressed by special interrogatories, such proposed interrogatories should be

presented to the Court as soon as practicable. Plaintiffs contend that there are "genuine issues of fact" regarding (1) whether the specific practices of defendants constitute overt acts under the continuing harm doctrine; (2) whether each settlement constitutes an overt act; and (3) whether damages are ascertainable until the settlement of each flock. These sound like issues of law for the Court to ultimately rule upon, but the matter will be discussed in due course.

It is the Order of the Court that the motion of the defendants for summary judgment (#449) is hereby DENIED.

ORDERED THIS 22nd DAY OF FEBRUARY, 2008.

Dated this 22nd Day of February 2008.

Ronald A. White
United States District
Eastern District of Oklahoma

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 08-7078

CHARLES BEEN, individually, d/b/a
Creekside Farm, Inc., *et al.*,
Plaintiffs - Appellees,

v.

O.K. INDUSTRIES, INC., an Arkansas corporation and
as administrator of health and benefit plans, *et al.*,
Defendants - Appellants,

and

KEN PRIMM, *et al.*,
Defendants.

NATIONAL CHICKEN COUNCIL, *et al.*.
Amici Curiae.

ORDER

Before BRISCOE, *Chief Judge*, TACHA, KELLY, LUCERO, MURPHY, HARTZ, O'BRIEN, TYMKOVICH, and GORSUCH, *Circuit Judges*.

Appellants' petition for panel rehearing is denied. A majority of the panel assigned to this matter also voted to grant the pending motion from the National Chicken Council and the American Meat Institute seeking leave to file a brief amici curiae. Accordingly, that brief shall be shown filed as of the date of its receipt.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that request is denied.

Entered for the Court,

/s/ ELISABETH A. SHUMAKER
ELISABETH A. SHUMAKER
Clerk of Court

185 (3)

No. 10-1065

Supreme Court, U.S.
FILED
MAR 30 2011
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In The
Supreme Court of the United States

O.K. INDUSTRIES, INC., O.K. FOODS, INC., O.K. FARMS, INC., AND O.K. BROILER FARMS LIMITED PARTNERSHIP,

Petitioners,

v.

CHARLES BEEN, DON FROST, ROBERT FIELDS, EDWIN JOHNSTON, AND EUGENE BLACKWELL, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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INTRODUCTION

The case described in the Petition bears little resemblance to the case litigated and decided below. Petitioners O.K. Industries, Inc., O.K. Farms, Inc., O.K. Foods, Inc., and O.K. Broiler Farms Limited Partnership (collectively "OK") suggest that the U.S. Court of Appeals for the Tenth Circuit has issued a ground-breaking decision that would free litigants from the necessity of conducting market analysis in rule of reason cases, specifically creating a conflict with cases decided under the Sherman Act that require a showing of market power in the output market. In reality, the Tenth Circuit issued a brief opinion affirming that the evidence presented at trial by Respondents – a class of approximately 300 Oklahoma chicken farmers ("Growers") – was sufficient to support the jury's verdict that OK violated § 202(a) of the Packers and Stockyards Act ("PSA"), 7 U.S.C. § 192(b). The Tenth Circuit affirmed that there was sufficient evidence that OK had monopsony power in the input market for the purchase of Grower services, and used its monopsony power in *that* market to engage in unfair practices which depressed input market prices and production, with the further likely effect of increasing output market prices.

As a result, OK's urged grounds for review are flawed. First, courts have consistently recognized that the PSA, while drawing on antitrust principles, is a remedial statute designed to protect farmers, like Growers here, from the powerful economic leverage of processors, like OK. Because the PSA has a broader

scope and purpose than the Sherman Act, a decision concerning the standards applicable to a § 202(a) claim cannot, as a matter of law or logic, create a "circuit split" as to the standards applicable to Sherman Act claims. Second, even if the legal standards governing claims under § 202(a) and general antitrust laws were identical, OK has chosen the wrong antitrust authorities. The claim upon which Growers prevailed is for abuse of monopsony power in an input (buying) market; whereas, the "conflicting" cases cited by OK involve challenges to vertical restraints in output (selling) markets. The fact that selling-side cases require a showing of market power in an output market is as unsurprising as the cases are inapplicable to a buying-side claim. Finally, OK fails to mention that its essential contention herein – that Growers should have been required to prove that OK had market power in the output market – was the subject of a contrary jury instruction, to which OK did not object. OK should not be permitted to seek review of the Tenth Circuit's judgment on the basis of a jury instruction that it accepted below.

Secondarily, OK presses a novel theory of statutory construction: that because § 202(a) of the PSA only prohibits unfair practices "with respect to *live* poultry," the statute cannot apply to OK's production decisions because those decisions were made *prior* to chickens having hatched. This interpretation of § 202(a) is at odds with the plain language and purpose of the statute, was soundly rejected by the

District Court and Tenth Circuit, and has not been adopted by any court in the PSA's 90-year history. Further, OK attempts to disguise within this statutory construction argument another sufficiency of the evidence argument: that OK should not have been found to have reduced production because it always produced at full capacity. To be clear, OK waived this issue by failing to raise it in a Fed. R. Civ. P. 50(a) motion, and in any event both the District Court and Tenth Circuit found that there was specific and substantial evidence that OK in fact reduced production. Therefore, OK's secondary arguments present no better grounds for certiorari review than its primary argument regarding output market power. The Petition should be denied.

STATEMENT OF THE CASE

1. Growers are a certified class of approximately 300 Oklahoma farmers who, during the relevant time period, raised broiler chickens for OK. Growers alleged that OK engaged in unfair practices in violation of § 202(a) of the PSA, 7 U.S.C. § 192(a). Specifically, Growers alleged that OK used its monopsony power in the relevant regional market – the market for the purchase of grower services in eastern Oklahoma – to engage in five practices that depressed Grower pay and had the likely effect of increasing OK's resale prices.

2. In *Been v. O.K. Industries, Inc.*, 495 F.3d 1217 (10th Cir. 2007) [hereinafter "*Been I*"], the Tenth Circuit, joining all other circuit courts to have considered the issue, held that § 202(a) of the PSA requires proof of injury or likely injury to competition. Considering the requirements for establishing such injury in the context of an allegation of "unfair practices" under § 202(a), the Tenth Circuit held: (a) the PSA's scope is broader than that of antitrust laws; (b) if there is but one purchaser of particular inputs in a particular region, such that the seller can find no alternative buyer, the purchaser is a monopsonist within that regional input market; and (c) to establish injury to competition, a plaintiff alleging abuse of monopsony power must show that the monopsonist engaged in practices that depressed prices on the input market with the effect or likely effect of increasing prices in the output market. *Id.*, App.55a-61a.

3. Reversing the district court's initial grant of summary judgment for OK, the Tenth Circuit found that Growers had presented evidentiary material that supported their contention that OK was a monopsonist in the area in which Growers operated, *id.* at App.55a, and that OK had engaged in practices – for example using its total control of input supply to manipulate Growers' production – that presented "the classic monopsony injury, namely that OK [wa]s depressing the prices it pa[id] the Growers and reselling at inflated prices." *Id.*, App.59a-60a. Thus, the Tenth Circuit held that a genuine issue of material

fact existed as to whether OK had violated § 202(a). *Id.*, App.59a.

4. Upon remand, the case proceeded to a jury trial, where the evidence showed:

a. OK is a vertically-integrated producer of poultry. During the class period OK was engaged in almost every stage of poultry production, including breeding, hatching, milling feed, medicating, transporting, slaughtering, processing, and selling on the wholesale market.

b. OK contracted with "growers" to raise broiler chicks to slaughtering age. The chickens placed with Growers at all times remained the property of OK.

c. Before OK provided contracts to Growers, it required them to obtain financing and build chicken houses to OK's exacting specifications, at a cost of hundreds of thousands of dollars.

d. Grower contracts are drafted by OK and are offered on a "take-it-or-leave-it" basis. Because OK does not present contracts to Growers until after the houses are built, Growers have no alternative but to accept.

e. OK's contracts only obligate it to provide Growers a single flock of chicks. Yet, as an OK officer admitted at trial, because of the large capital commitment required to build houses, a Grower may need to

raise chickens for up to 25 years to recover his or her initial investment.

f. OK's contracts prohibit Growers from using chicks, feed, or medicine from any source other than OK. The contracts prohibit Growers from raising chickens for other buyers, even if OK decreases the amount of birds delivered to Growers.

g. No other integrator operates in the geographic area of eastern Oklahoma in which Growers' farms are located. Because OK is the only buyer of Grower services in the area, Growers have no option but to sell to OK. Both Growers' and OK's experts agreed that OK is a monopsonist in the area in which Growers' farms are located.

h. OK is not only a monopsonist in the input market for Grower services, it has complete control over input supply. OK approves who will be a Grower and where, and determines if and when to deliver flocks to Growers. OK alone decides the number of flocks of chickens placed with Growers, the number of chicks per flock, the breed and health of the chicks in a flock, the quantity and quality of feed given to the flock, the use and type of medications given to the flock, and the date on which the flock is collected for processing.

5. Through discovery, Growers obtained actual statistical data collected by OK on *every* flock raised

by *every* OK grower during the class period. This data was exhaustively analyzed by Growers' expert witness and agricultural economist, Dr. C. Robert Taylor of Auburn University. At trial, Taylor testified about his examination of this data and analyses of OK's practices, including their effects on OK's input and output markets. Specifically:

a. Taylor testified that the data and analyses showed OK used its monopsony power and complete control of input supply to engage in five unfair practices that harmed Growers and injured competition. Most notably, OK in certain economic circumstances manipulated Grower production downward by (i) altering the number of days between flocks placed with Growers, and (ii) altering the number of chickens per square foot of housing space, or "density," of flocks placed with Growers. Taylor testified that each of the challenged practices had the effect of depressing Grower pay below what it would have been in a competitive market, and directly and/or indirectly reducing production of chicken products below what it would have been in a competitive market.

b. Applying economic principles of monopsony to the facts at issue in this case, Taylor testified that the decreases in input-market price and production caused by each of the challenged practices would reduce supply to the output

market and likely lead to increases in output market prices.

c. Taylor testified that each of the challenged practices had in fact resulted in specific, actualized impact on OK's immediate resale and national wholesale prices. Specifically, Taylor performed four regression analyses examining the relationship between OK's production and output prices, which showed: (i) when OK decreased production, its average sales price increased; (ii) when OK decreased production, its average sales price increased relative to the average national sales price; (iii) when OK decreased production, the average national sales price increased; and (iv) when OK received a lower-than-typical price, its production two months later (*i.e.*, after the time it takes to raise chickens) decreased. OK's expert agreed that these analyses were correctly calculated and that up to 75% of OK's price variations could be attributed to monopsonistic practices.

d. Taylor concluded that OK underpaid Growers as a result of their anticompetitive actions during the class period, and calculated the difference between the profits Growers actually received and the profits they would have earned in a competitive market (*i.e.*, a market free of the anticompetitive conduct in question), as $14,511,935.

6. On March 10, 2008, the jury returned a verdict in favor of Growers, finding that OK had violated § 202(a) of the PSA and awarding Growers damages of $21,141,975.[1] On July 3, 2008, the district court denied OK's motion for judgment as a matter of law ("JMOL") and conditionally denied OK's motion for new trial, *sua sponte* suggesting remittitur to $14,511,935. In an effort to end litigation that had already lasted six years, Growers consented to the suggested remittitur.

7. In *Been v. O.K. Industries, Inc.*, 2010 WL 3995981 (10th Cir. Oct. 13, 2010) [hereinafter "*Been II*"], the Tenth Circuit was called upon to review the case for a second time. The Tenth Circuit affirmed the

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[1] In its Petition, OK attempts to relitigate factual disputes decided against it at trial, and in several instances does so based on assertions that are inconsistent with the record evidence. In particular, cognizant of Supreme Court Rule 15.2, Growers point out that: (a) OK asserts that Growers "conceded" that production was unaffected by OK's practices, when in fact – as noted by the Tenth Circuit, *Been II*, App.18a – Growers argued and proved that OK's practices depressed production; (b) OK asserts that Growers "conceded" that OK produced to its full capacity, even though – again as noted by the Tenth Circuit, *id.* – Growers argued and proved that OK at times deliberately decreased production; (c) OK asserts that Growers "conceded" that OK never terminated a Grower, despite that Growers presented evidence of just that; (d) OK asserts that it invested "more than $370,000 each year to supply inputs to [a] two-house farm," *see* Petition at 9, when there was no such evidence below; and (e) OK asserts that Taylor "conceded" that OK's density decisions did not affect production, when in fact Taylor testified that decreasing density was one means by which OK reduced production below what it would have been in a competitive market.

judgment below, holding *inter alia* that OK had waived many of the arguments raised on appeal; that the jury had been instructed in accordance with the correct standards for proof of violation of § 202(a); and that sufficient evidence supported the jury's verdict. *Been II*, App.16a-33a. Specifically, in response to OK's argument that its practices could not have affected output prices because it lacked output market power, the Tenth Circuit found that there was specific and sufficient evidence that OK's practices impacted both its immediate resale and the national wholesale prices for chicken products, and thus, at minimum, established that such practices, over time, were likely to increase consumer prices for OK's products in comparison to what prices would have been but for the practices. *Id.*, App.19a-20a. The Tenth Circuit likewise rejected OK's restrictive construction of the phrase "with respect to live poultry" in § 202(a) and, in response to OK's argument that it had always operated at full capacity, found that there was specific and sufficient evidence that OK could and did vary its production levels. *Id.*, App.16a-18a.

REASONS TO DENY THE PETITION

I. REVIEW IS UNNECESSARY WHERE OK WAIVED THE ISSUE IT SEEKS TO PRESENT AND WHERE THE TENTH CIRCUIT'S OPINION ADDRESSES A QUESTION OF PROOF RATHER THAN A QUESTION OF LAW, AND HAS NO IMPACT ON THE ANTITRUST LAWS.

As shown in the Statement of the Case, *infra*, Growers established at trial that OK held monopsony power in the market for the purchase of grower services in eastern Oklahoma, and that OK used its monopsony power to engage in practices which decreased grower production and pay, with the effect, or likely effect, of increasing prices in the output market. The Tenth Circuit held that, under *Been I*, this evidence was sufficient to sustain the jury's verdict against OK on Growers' claim for violation of § 202(a) of the PSA.

OK contends, however, that the Tenth Circuit erred by not requiring Growers also to make a threshold showing that OK possessed market power in the *output* market for the sale of chicken meat. From this foundation, OK erroneously asserts that, because the Tenth Circuit found Growers' expert testimony and analysis demonstrating likely increases in output prices was sufficient to affirm the jury's verdict, the Tenth Circuit's opinion establishes a rule that evidence of actual detrimental effects is sufficient to demonstrate injury to competition for every case brought under the antitrust laws. Such a

holding, argues OK, creates a split among the circuits because "[i]n cases challenging vertical conduct, the circuit courts have consistently held that proof of injury to competition requires a threshold showing that the defendant wields power in the relevant output market." Petition at 5.

As the following demonstrates, OK failed to object when the District Court instructed the jury that proof of output market power was not part of Growers' burden of proof under § 202(a). OK thus waived appellate review of this claim. In any event, the District Court allowed OK to argue to the jury, as a defense, that its alleged lack of market power precluded a finding of likely impact on output prices. The jury simply rejected OK's evidence on this point. Further, because *Been II* addresses only whether Growers met their burden of proof under § 202(a), it creates no conflict with other circuits as to a plaintiff's burden of proof under the antitrust laws.

A. Review is not warranted where OK failed to preserve its claim that Growers were required to prove that OK possessed market power in the output market under § 202(a) of the PSA, and where OK was nevertheless permitted to present evidence of its alleged output market share to the jury as a defense.

Following remand from the Tenth Circuit in *Been I*, OK moved for summary judgment on the ground,

inter alia, that OK was incapable as a matter of law of affecting prices in the output market due to its allegedly minimal market share in the output market. After noting that the parties disagreed about whether proof of an integrator's market power in the output market was a distinct element of a plaintiff's claim under § 202(a), *see* Order Denying Mot. For Summary J., App.95a-97a, the District Court deferred ruling on this issue. *Id.*, App.98a. Subsequently, however, the District Court rejected OK's argument, instructing the jury:

> You are specifically instructed that whether or not defendants have market power in the output market is not part of plaintiffs' burden of proof.

Order Denying Mot. For JMOL, App.83a. *OK did not object to this instruction. Id.* Accordingly, when OK sought JMOL on the ground that Growers had failed to show that OK exercised market power in any output market, the District Court indicated that its review of this instruction was limited by Fed. R. Civ. P. 51 to "plain error," which the Court concluded was not present. *Id.*

In its Petition, OK mentions neither the District Court's jury instruction regarding market power in the output market, nor its acceptance of that instruction. Further, OK makes no claim that the District Court committed plain error in its jury instructions. In any event, even if the District Court's instruction had been erroneous, OK was not harmed by the error

because the District Court permitted OK to admit evidence purporting to show its lack of output market power and to argue that this evidence meant that it had no ability to raise output prices. As the District Court stated:

> Clearly the Tenth Circuit did not place the burden on plaintiffs to demonstrate defendants' market share in the output market. This court permitted defendants to present such evidence as a defense, but *the jury manifestly rejected that defense.*

Order Denying Mot. For JMOL, App.83a (emphasis added). Because OK was permitted to present its market-share arguments to the jury, along with whatever evidence it felt supported that argument, OK's complaint is simply that the jury should have believed its evidence, but did not. This is not an appropriate basis for certiorari review.

B. The Tenth Circuit's conclusion that Growers met their burden of proof under § 202(a) of the PSA does not, and could not, conflict with antitrust authorities.

In *Been II*, the Tenth Circuit was called upon to address the sufficiency of Growers' evidence to support their claim against OK for "unfair practices" under § 202(a). The Court was not called upon to evaluate a challenge to a vertical restraint under the antitrust laws, as OK would suggest. Because the evidence showed that OK was a monopsonist in the

relevant market, the Tenth Circuit's inquiry was simply whether Growers' evidence was sufficient to show that OK's practices were likely to cause "the arbitrary manipulation of market prices by unilaterally depressing seller prices on the input market with the effect (or likely effect) of increasing prices on the output market." *Been II*, App.4a (quoting *Been I*, App.57a). The Tenth Circuit found that Growers had presented sufficient evidence to meet their burden of proof under § 202(a) and to sustain the jury's verdict. In particular, the Court stated:

> The Growers' expert, Taylor, opined that OK's production practices impacted immediate resale and national prices. That testimony, notwithstanding OK's own evidence of its purported lack of market power, was sufficient in our view both to create a genuine issue of material fact as to whether OK's production practices 'over time [were] likely to increase consumer prices for [OK's] products in comparison to what prices would have been but for the practice,' . . . and to support the jury's verdict in favor of the Growers.

Been II, App.19a.

As this reflects, the Tenth Circuit's holding was simply that the evidence produced by Growers was sufficient to satisfy the particular standard of proof for (a) a claim alleging abuse of *monopsony* power, that (b) was brought under § 202(a) of the *PSA*. OK's contrary description of the underlying holding – that

Been II deems evidence of actual detrimental effects "sufficient for every case brought under the antitrust laws" – is an extreme overstatement.

In attempting to manufacture the appearance of a conflict between *Been II* and antitrust authorities, OK ignores the fact that the PSA and the Sherman Act are distinct statutes. The PSA is a remedial statute designed to protect farmers and, by extension, the public against the economic power of the intermediary firms that stand between the two. As this Court has explained, "[t]he chief evil feared [by the PSA] is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer, who buys." *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922). *See also Been I*, App.48a ("the primary purpose of [the PSA] is to . . . safeguard farmers . . . against receiving less than the true market value of their livestock." (internal quotation marks omitted)); *Swift & Co. v. U.S.*, 393 F.2d, 247, 253 (7th Cir. 1968) ("The [PSA] is remedial legislation and is to be construed liberally in accord with its purpose to prevent economic harm to producers and consumers at the expense of middlemen."). To this purpose, while the PSA incorporates "the basic antitrust blueprint of the Sherman Act," it is intended to be "broader than antecedent antitrust legislation." *Been I*, App.48a, 55a; *see also Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961) ("The legislative history shows Congress understood the sections of the Packers and Stockyards Act under consideration were broader in

scope than [the Sherman Act, the Clayton Act, the Federal Trade Commission Act, and the Interstate Commerce Act]"). The PSA thus "proscribes practices which the Sherman Act would permit." *De Jong Packing Co. v. USDA*, 618 F.2d 1329, 1335 n.7 (9th Cir. 1980) (citing *Armour & Co. v. United States*, 402 F.2d 712, 722 (7th Cir. 1968)). For example, unlike general antitrust law, § 202(a) does not require that a defendant willfully acquire monopoly (or monopsony) power, or that a defendant have the power to exclude competitors or the intent to harm competition. *Been I*, App.55a. Accordingly, OK's premise that the Tenth Circuit's decision about the standards of proof for a claim under § 202(a) of the PSA would be read as applying to a claim under the Sherman Act is unpersuasive.

Moreover, even if the Tenth Circuit's analysis in *Been II* were somehow taken to apply to claims under the Sherman Act, it would not conflict with the authorities cited by OK. Each of the cases OK cites as holding that an antitrust plaintiff must demonstrate market power in an *output* market involves a challenge to selling practices. *See Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717 (7th Cir. 2004) (challenging manufacturer's sale of cigarette papers through exclusive distributorship agreements); *PSKS, Inc. v. Leegin Creative Leather Prods.*, 615 F.3d 412 (5th Cir. 2010) (challenging manufacturer's use of vertical resale price maintenance agreements); *Digital Equipment Corp. v. Uniq Digital Techs., Inc.*, 73 F.3d 756 (7th Cir. 1996)

(challenging manufacturer's termination of distributorship agreement); *Deutscher Tennis Bund GmBH v. ATP Tour, Inc.*, 610 F.3d 820 (3d Cir.), *cert. denied*, 131 S. Ct. 658 (2010) (challenging tennis association's decision to downgrade status of tournament). Where the challenged conduct occurs in an output market, it is hardly surprising that the plaintiff would be required to show that the defendant possesses market power in that output market.

That is not the situation at issue here. This case involves OK's buying practices, and alleged abuse of its monopsony power in the input market. Where the challenged conduct occurs in an *input* market, a plaintiff must show market power in that market, not the output market. *See Weyerhauser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 323-24 (2007) (explaining that monopoly and monopsony are analytically identical but flipped; rather than examining seller behavior and output prices, monopsony cases focus on buyer behavior and input prices); *Been I*, App.55a ("when analyzing whether a buyer's 'monopsony' power injures competition . . . the inquiry is somewhat different from the inquiry into whether a seller's monopoly power injures competition"). Here, it was undisputed that OK had 100% market power in the relevant market: the input market for the purchase of grower services in eastern Oklahoma. In not requiring Growers to establish that OK possessed market power in an output market as an element of their monopsony claim, the Tenth Circuit has not deviated one bit from antitrust precedents. Neither

the Tenth Circuit nor this Court has required plaintiffs challenging the abuse of monopsony power to prove that the defendant has market power in the output market. *See, e.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235-36 (1948) (holding that sugar-beet growers stated a valid monopsony claim under the Sherman Act despite not even alleging an effect on consumer prices); *Telecor Communications, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1134 (10th Cir. 2002) (rejecting claim that a monopsony plaintiff must show impact in output market).

There is thus no conflict or "circuit split" created by *Been II* and *Republic Tobacco*, because they address divergent factual and legal contexts. In the absence of any identifiable conflict among the circuits relating to the actual holding of *Been II*, review of the Tenth Circuit's opinion is not warranted.

II. REVIEW OF OK'S STRAINED CONSTRUCTION OF THE PHRASE "WITH RESPECT TO LIVE POULTRY" IS UNWARRANTED WHERE OK IDENTIFIES NO CIRCUIT SPLIT. NOR DOES OK'S DISGUISED SUFFICIENCY OF THE EVIDENCE ARGUMENT REGARDING ITS PRODUCTION LEVELS PRESENT A PROPER GROUND FOR REVIEW.

In Section III of the Petition, at pages 28-33, OK ostensibly presents a statutory construction argument regarding the phrase "with respect to live

poultry" in § 202(a) of the PSA. However, in almost the entirety of that section, as well as a significant portion of OK's Statement of the Case, OK addresses a different argument altogether: that there was insufficient evidence that OK's practices decreased production. Neither issue implicates a circuit split or any other basis for certiorari review.

A. OK's construction of § 202(a) is without merit and has not been adopted by any court.

OK argues that § 202(a) should be construed to prohibit only unfair practices involving chickens that have already hatched, and that it was thus error for OK to be held liable for decisions to manipulate production if such decisions were taken prospectively. As summarized by the Tenth Circuit:

> OK argues that the PSA requires the Growers to prove that OK used an unfair practice with respect to actual, live birds that have already hatched. In particular, OK argues that under the statute, the Growers were required to show that OK produced certain actual, live chicks, and then either destroyed them or otherwise refused to allow the Growers to raise them.

Been II, App.16a. The Tenth Circuit rejected OK's interpretation of § 202(a) as "strained" and "without merit," holding:

> [P]rice manipulation in the form of arbitrarily reducing production may violate the PSA as an unfair practice. And a practice that reduces chick production by incubating fewer eggs, for example, is a practice "with respect to live poultry" as much as a practice that reduces chick production by destroying chicks that have already hatched. Both practices result in fewer live chickens being delivered to the Growers to raise and sell back to OK. Thus, either way, OK is reducing the price it pays its Growers for live poultry.

Id., App.17a (citations omitted).

There is no circuit split on this issue. Indeed, OK does not cite a single opinion in the PSA's 90-year history that supports its position. Moreover, OK's interpretation is at odds with the purpose of § 202(a) and long-established principles of statutory construction. The PSA "is remedial legislation and is to be construed liberally in accord with its purpose to prevent economic harm to producers and consumers at the expense of middlemen." *Swift & Co. v. U.S.*, 393 F.2d 247, 253 (7th Cir. 1968). Further, statutes are construed based on the plain and ordinary meaning of their words. *See Wultz v. Islamic Republic of Iran*, ___ F.Supp.2d ___, 2011 WL 263676, *5 (D.D.C. Jan. 28, 2011). Here, "with respect to" means "as regards" and "in relation to" and thus "merely indicates some relationship." *Hartford Cas. Co. v. Travelers Indem. Co.*, 110 Cal.App.4th 710, 719-20 (Cal.Ct.App. 2003); *see also Dillon Cos., Inc. v. Royal Indemnity Co.*, 369 F.Supp.2d 1277, 1287 (D. Kan. 2005). As correctly

decided by the Tenth Circuit, decisions that cause a decrease in the supply of live poultry involve live poultry no matter when they are made.

B. OK's disguised sufficiency of the evidence argument was waived and is without merit.

Throughout the Statement of the Case and Section III of the Petition, OK repeatedly argues that it always produced at full capacity and thus never varied production. To be clear, this is a sufficiency of the evidence argument that was not preserved for appellate review.[2] *See* Order Denying Mot. For JMOL, App.82a. Further, such argument was rejected by both the District Court and the Tenth Circuit, which found that Growers demonstrated through specific and substantial evidence that, through the challenged practices, OK decreased production when it desired. *Id.*; *Been II*, App.18a. While OK may be unhappy that the jury chose to accept Growers'

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[2] Under Tenth Circuit law, failure to file a Fed. R. Civ. P. 50(a) motion bars appellate review of whether the evidence was sufficient to support the jury's finding. *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1228 (10th Cir. 2000), *aff'd*, 532 U.S. 588 (2001). OK failed to address sufficiency of the evidence with respect to production levels in its Rule 50(a) motion.

evidence on this disputed fact issue, that is not a ground for certiorari review.

CONCLUSION

This case was filed by a class of Oklahoma farmers in 2002. On its first appeal, the Tenth Circuit articulated the standards of proof governing claims under § 202(a) of the PSA, and held that a genuine issue of material fact existed as to whether OK had engaged in unfair practices in violation of that statute. After remand, the jury issued a verdict in favor of Growers. Both the District Court and the Tenth Circuit have held that the evidence was sufficient to support that verdict.

Now, nine years after this case was initiated, and three years after the jury's decision, OK asks this Court to reverse the judgment for Growers based on an issue that was the subject of a jury instruction that OK accepted, and that did not preclude OK from presenting the evidence of its allegedly minimal market share to the jury. The jury rejected OK's evidence. While OK is understandably unhappy at this result, it has failed to demonstrate that either the jury's verdict or the Tenth Circuit's opinion sustaining it could have any impact on the antitrust laws. Thus, there is no "circuit split" in need of resolution by this Court. For these reasons, and because OK can cite to no conflicting authorities regarding its

meritless "live chickens" argument, the Court should deny the Petition for Certiorari.

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Supreme Court, U.S.
FILED
APR 11 2011
OFFICE OF THE CLERK

No. 10-1065

IN THE

Supreme Court of the United States

O.K. INDUSTRIES, INC., O.K. FOODS, INC., O.K. FARMS, INC., AND O.K. BROILER FARMS LIMITED PARTNERSHIP,
Petitioners,

v.

CHARLES BEEN, DON FROST, ROBERT FIELDS, EUGENE JOHNSON, AND EUGENE BLACKWELL, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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IN THE

Supreme Court of the United States

No. 10-1065

O.K. INDUSTRIES, INC., O.K. FOODS, INC., O.K. FARMS, INC., AND O.K. BROILER FARMS LIMITED PARTNERSHIP,
Petitioners,

v.

CHARLES BEEN, DON FROST, ROBERT FIELDS, EUGENE JOHNSON, AND EUGENE BLACKWELL, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS [1]

ARGUMENT

I. INTRODUCTION

Respondents make three contentions. First, that Petitioners ("O.K.") cite illusory conflicts between the decision below and those of other circuits, *e.g.*, *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 517 (3rd Cir. 1998) (20-25% market share excludes market power as a matter of law), and *Republic Tobacco Co. v. North Atlantic Trading*

[1] Petitioners' Rule 29.6 Statement appears at Pet. ii

Co., Inc., 381 F.3d 717, 737 (7th Cir. 2004) (actual detrimental effects analysis cannot substitute for showing market power in cases challenging vertical restraints). Respondents contend that the Tenth Circuit's decision held that the standards governing competitive injury under the Packers and Stockyards Act ("PSA") 7 U.S.C. § 192(a) differ from those applicable under the Sherman Act 15 U.S.C. §§ 1,2.

Respondents' argument supplies an additional reason why the Court should grant the Petition: Respondents' argument has brought to more focused light a pertinent, fundamental Circuit conflict between the circuits with respect to PSA. The Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have all held that PSA "unfairness" claimants must prove "injury to competition," because the PSA incorporates the basic Sherman Act blueprint, *De Jong Packing Co. v. United States Dept. of Agriculture*, 618 F.2d 1329, 1335 n. 7 (9th Cir.) *cert. denied*, 449 U.S. 1061 (1980).[2]

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[2] *See also, Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 276-79 (6th Cir. 2010), *cert. denied*, 2011 WL 197656 (U.S. Jan. 24, 2011); *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (en banc); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir.), *cert. denied*, 546 U.S. 1034 (2005); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, 1998 WL 709324 at *4-5 (4th Cir. Oct. 5, 1998); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *Farrow v. U.S. Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985); *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir. 1976).

Nothing in any decision from the seven other circuits suggests that injury to competition under the PSA differs from injury to competition under the Sherman Act, or that agricultural markets are more susceptible to anticompetitive practices than non-agricultural markets. Respondents' own reading of the Tenth Circuit's opinion places that decision in significant conflict with the decisions of the other circuits that have addressed this PSA issue. For example, *London v. Fieldale Farms, Inc.*, 410 F.3d at 1365, affirmed a summary judgment in favor of a poultry processor because the grower-plaintiff submitted no evidence that the processor had market power as that concept is understood under the Sherman Act (and competition law cases generally). *London* specifically noted that its grower-plaintiff had introduced no evidence of the defendant processor's market share.

Second, Respondents suggest that the market power issue was waived. The Tenth Circuit actually decided the issue raised by the petition with no suggestion that it was conducting a "plain error" review. The Circuit was led to conduct a plenary review of this question by *Aspen Highlands Skiing Co. v. Aspen Skiing Co.*, 738 F.2d 1509, 1518 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985), which held that an issue raised in a motion for judgment as a matter of law is not waived if the defendant later fails to object to an instruction embodying a contrary rule. This Court subsequently granted certiorari to decide the very question *Aspen Highlands'* respondent claimed had been waived. Respondents' waiver contention provides no basis for denying review of the market power issue raised in the petition.

Finally, Respondents dispute O.K.'s contention that the PSA's limitation to practices used "with respect to live poultry" means that if there is no evidence that O.K. suppressed the production of any live birds under its control, it cannot as a matter of law be found liable for having reduced its production. Furthermore, as O.K. noted to both the trial court and the Tenth Circuit, this defect cannot be addressed by claims that O.K. failed to produce at hypothetical levels, such as the level that "perfect competition" for grower services would supposedly generate.

O.K. specifically noted on the Record, when it moved to dismiss Growers' claim as a matter of law for insufficiency, that there was an absence of evidence showing a "practice with respect to live poultry" that suppressed production. The Tenth Circuit's holding effectively requires processors to produce at or above capacity without regard to economic conditions or the availability of "extra chicks" to supplement the output from their own hatcheries. This is an important question of statutory interpretation governing activities in the nation's vital food industry. The issue of the legal sufficiency of such evidence under a proper interpretation of the statute was never waived and is properly before this Court, and warrants review as well.

II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THOSE OF OTHER CIRCUITS BY HOLDING THAT UNILATERAL CONDUCT MAY INJURE COMPETITION WITHOUT A SHOWING OF MARKET POWER.

Respondents do not contend that O.K. wields market power under Sherman Act standards given its negligible share of the output market and its sales by competitive bid there. O.K.'s substantially-increased output across the relevant period, during which consumer prices also steadily fell, confirms that total output to the market was not perniciously "reduced" by anything O.K. did. Respondents likewise do not argue that O.K. misreads *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460 (1986) when O.K. claims that evidence of putative anticompetitive effects cannot substitute for market power in cases challenging unilateral conduct or vertical restraints. Such a license is issued to plaintiffs when they challenge horizontal restraints that facially restrict output. *See Republic Tobacco*, 381 F.3d at 737.

Respondents avoid market power concerns by embracing the understanding that the Tenth Circuit has held market power unnecessary to be proved in a PSA case against a monopsony because the competitive injury standards governing the Sherman Act and the PSA are different. By assuming that the effect (injury to competition) may exist without the cause (market power), the Tenth Circuit's holding renders PSA claims economically irrational.

As a matter of basic economics and of law, parties holding a 2% share of the output market, acting unilaterally, are unable to injure competition. *See*,

e.g., *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 667 (7th Cir.) *cert. denied*, 484 U.S. 977 (1987); *Dimmit Agri. Indus., Inc., v. CPC Int'l, Inc.*, 679 F.2d 516, 530 (5th Cir. 1982). If Respondents' assertion is correct, no circuit, save the court below, has ever suggested that standards for competitive injury under the PSA or Sherman Act depart from such fundamental economic principles.

A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396 (7th Cir. 1989) explains why price manipulation is the rare exception in agricultural markets:

> Economists frequently give agricultural products like wheat as an example of perfect competition. Concentration is low and the product is fungible. Anyone who tries to charge more than the going price loses sales quickly....

Id., at 1397 (Easterbrook, J.) Dismissals as a matter of law in favor of defendants with negligible market shares occur not because particular words in the Sherman Act command such a result, but because logic, experience, and settled economics do.

Respondents attempt to circumvent this basic point by contending that Sherman Act cases relax the market power requirement if a monopsony is challenged, relying on both *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948) and *Telecor Commc'ns, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124 (10th Cir. 2003), *cert. denied*, 538 U.S. 1131 (2003). Neither case supports their position.

Mandeville Island did not address market power because plaintiffs challenged a horizontal price-fixing buyer's cartel. The challenged conduct was illegal *per*

se, rendering it unnecessary for sellers to prove that the cartel had market power.

Telecor's plaintiff *lost* its Sherman Act claim, 305 F.3d, at 1129, but prevailed under a state statute more broadly drawn than the Sherman Act. *See Harold's Stores, Inc., v. Dillard's Dept. Stores, Inc.*, 82 F.3d 1533, 1550 (10th Cir. 1996). If the liability *formulae* of the state statute and the Sherman Act had been identical, a new trial would have been necessary because the verdicts would have been fatally inconsistent. *Telecor*'s facts showed that its defendant injured consumers by charging supra-competitive pay phone tolls, which was possible because the defendant held a localized *monopoly* (with respect to consumers) that had arisen over many decades when it was the only party legally entitled to operate pay phones. The defendant in those years was the only possible "buyer" for likely pay phone sites, and thus a monopsony with respect to location owners as well. Beginning in the early 1990's, *Telecor*'s defendant quickly leased almost every other likely pay phone location in the local market in order to prevent future competitive entry once pay phone service was de-regulated. Locking up sites allowed the defendant to maintain its output monopoly after de-regulation, and to continue charging uncompetitive tolls: if others enjoyed access to the market, and could "de-monopolize" it, competition would force tolls down from 50-cents, to the competitive 35-cent level.

Telecor cannot sensibly be read to hold that input monopsonies, *simpliciter*, inherently cause competitive injury, or that all monopsonies have inherent power to restrict output-market competition and raise consumer prices. As noted in the Petition, economic

theorists reject that proposition, and Respondents cited no authorities who support a contrary position.

Respondents argue, finally, that cases such as *Republic Tobacco, supra,* and *Deutscher Tennis Bund GmBH v. ATP Tour, Inc.,* 610 F.3d 820 (3rd Cir.), *cert. denied*, 131 S. Ct. 658 (2010) do not conflict with the decision below because they involve harm from acts done in the output market, whereas this case involves an input market monopsony. The argument is economically unsound. The only reason competition law concerns itself with input monopsonies is because, by restraining its demand for an input, it is possible for a monopsonist to restrain the *total* amount supplied by *all* producers. That is possible, however, only if the monpsonist's own total production "looms so large" in relation to others', that its own shortfall cannot be addressed by increased production from rivals. *Cf. L.A.P.D., Inc. v. Gen. Elec. Corp.*, 132 F.3d 402, 405 (7th Cir. 1998).

A reduction in *total* output to the market will injure competition; reduction in total output from one small source of supply will not. A "reduction" in total supply capable of distorting total production into the output market requires "market power". That term bears the same sense no matter what statute (PSA or Sherman Act) is being studied. There is no rational or legal economic case to be made for treating monopsony under the PSA any differently from the Sherman Act. PSA's roots are in the Sherman Act. When a later statute accepts terms and principles transplanted from an earlier statute, those terms and principles "bring their soil with them." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947). Respondents' argument that the Tenth Circuit has created an

exception unrecognized by other circuits provides additional support for the necessity of a grant of certiorari.

III. THE PLAIN LANGUAGE OF THE PSA OBLIGES GROWERS TO SHOW THAT PRODUCTION WAS REDUCED AS A RESULT OF PRACTICES USED WITH RESPECT TO ACTUAL LIVE BIRDS.

The scope of PSA liability is boundless if courts may assess damages based on animals never actually in the "flow" of commerce, but on animals that might have been so produced if O.K.'s capacity were sufficiently great to meet Growers' demands (as opposed to consumers'). Nothing in the legislative history or in the case law sanctions so expansive a view.

Respondents' opposition invokes two cases broadly interpreting insurance policies to urge a similarly broad construction of the PSA, claiming that such authorities understand the phrase "with respect to" as requiring only that "some relationship" be shown between O.K.'s practices and its "total production." *E.g., Hartford Cas. Co. v. Travelers Indemnity Co.*, 110 Cal. App. 4th 710, 719-20 (2003). Courts interpreting insurance policies do so most strongly against the drafter's intent. In contrast, courts interpreting statutes must positively determine and execute the legislature's intent. In doing so, statutory language must be interpreted to avoid unreasonable consequences. *Birdwell v. Skeen*, 983 F.2d 1332, 1337 (5th Cir. 1993).

Remedial statutes are not infinitely elastic: *Arnett v. United States*, 889 F. Supp. 1424, 1427 (D. Kan 1995), for example, held that a statute forbidding certain conduct "in connection with" collecting a tax

did not apply to assessing the tax, even though the two are part of the same process and bear "some relationship" with one another. Similarly, *Michigan Protection & Advocacy Center v. Babin*, 799 F. Supp. 695, 716 (E.D. Mich), *aff'd* 18 F.3d 337 (6th Cir. 1993), concluded that a statute forbidding discrimination "with respect" to the sale of property only regulated the conduct of parties to the sale, not third parties trying to prevent it. Respondents' argument that PSA is a remedial statute to be interpreted broadly ignores the fact that the Sherman Act, too, is remedial. Nothing in Sherman's language requires a showing of market power, or that agreements be scrutinized under the Rule of Reason. These requirements are the product of sound construction. Sound construction should apply as well to the plain language of PSA.

In this connection, *Blue Chip Stamps v. Manor Drug Stores, Inc.*, 421 U.S. 723 (1975) held that an actual "purchase or sale" of a security must be proved under a rule forbidding deception "in connection with the purchase or sale of a security." *Blue Chip Stamps* noted that a failure to confine the scope of the rule to actual transactions would open the way for parties to claim profits that they, hypothetically, would have made if an initial purchase had not been discouraged. Respondents below complained that under their contract with O.K., they did not produce as much as they would have if, hypothetically, many buyers had competed for their services. Focus on chimeras like "perfect competition" ignores a very real, limiting contingency, *viz.*, that even if ten other processors operated nearby, O.K. could never have produced more than it hatched.

Statutes must be construed to take market participants as they are, and regulate their actual acts and capabilities to act, without investing them with powers they do not have, in order to penalize them for failing to achieve production levels they are unable to attain. Statutes should be interpreted to provide a rational response to a relevant situation. *Soloman Forex, Inc. v. Tauber*, 8 F.3d 966 (4th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). Enforcing the plain-language limitation on PSA's breadth, and obliging Respondents to prove unfair practices that were used "with respect to live poultry," advances every legitimate aim of a statute passed to remove burdens on the flow of meat to market, without creating arbitrary benchmarks that oblige processors to guess what their output would be if competitive conditions were somehow "perfect," especially where they cannot change the fact that certain sellers lack the ability to sell their services elsewhere.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition should be granted and the judgment below reversed.

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